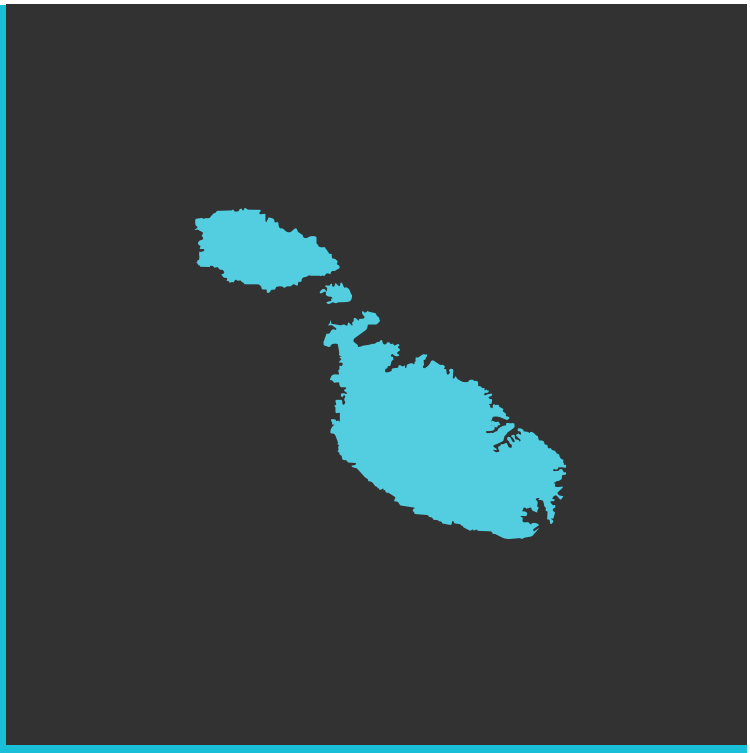
Country Guide
Malta

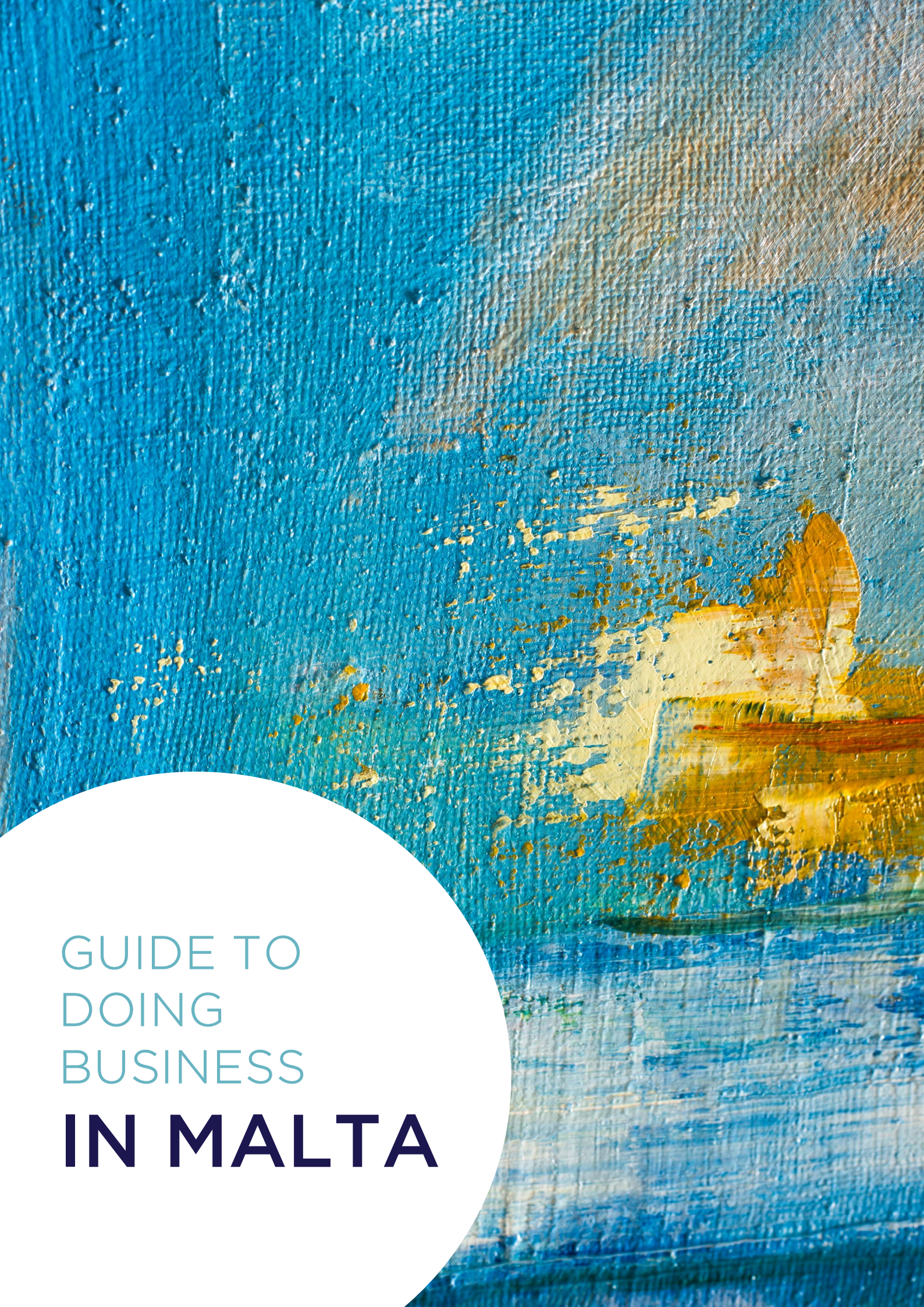


Prepared by

ganado
advocates

LexMundi
Bringing the
best together™

lexmundi.com



GUIDE TO DOING BUSINESS IN MALTA

LexMundi
World Ready

4th Edition: 2018

Contributed by:

GANADO
ADVOCATES

171, Old Bakery Street, Valletta VLT 1455, Malta
Tel No: +356 2123 5406
E-mail: lawfirm@ganadoadvocates.com
Website: www.ganadoadvocates.com

TABLE OF CONTENTS

”

PREFACE

I am pleased to submit to Lex Mundi and its respective Members our Fourth Edition of the “Guide to Doing Business in Malta”.

The preceding edition was published at the end of December, 2011, so it is evident that the new Guide has undergone numerous and substantial changes.

Since that time, we have - like several other jurisdictions - experienced intense legislative activity in many areas, not least occasioned by the aftermath and continuing repercussions of the 2008 financial crisis.

Despite this, and on a purely domestic level, Malta as a whole has experienced significant economic growth over this period and, in fact, is consistently one of the best performers among EU member states. This has brought about a profound increase in the volume, quality, diversity and sophistication of the work we are handling as a Firm in conjunction with a growing number of leading national and international law firms, many of whom are Lex Mundi members. It has also resulted in significant growth in our Firm’s spread of human resources, particularly in the legal, regulatory and compliance fields.

With our commitment to putting clients first, and supported by the opportunities that Lex Mundi constantly presents its members, we look forward with conviction to addressing the new and exciting challenges that innovation, disruptive technology and the changing face of the global legal landscape are bound to throw our way.

Dr. Adrian M. Gabarretta

(Lex Mundi Contact Person)
Valletta, Malta
20th December, 2017

Disclaimer: *The information contained in this Guide was last updated during December, 2017. While every effort has been made to ensure the accuracy and sufficiency of the information contained herein, this Guide is not intended to impart advice but only to provide information. Readers are advised to seek confirmation of statements made herein before acting, or otherwise relying, on them; and specialist advice sought on specific issues.*

CHAPTER 1: GANADO ADVOCATES

1.1 Overview of GANADO Advocates

GANADO Advocates (formerly Ganado & Associates) is the Malta member of Lex Mundi and is one of Malta's foremost commercial law firms, consistently ranking as a leading firm in all its core sectors. Our firm traces its origin to the turn of the last century and has undergone considerable expansion over the years since the founding partner, Professor J.M. Ganado, took up the practice in 1950.

Today, GANADO Advocates continues to have a strong commercial practice with a particular focus on the corporate, financial services and maritime sectors, predominantly servicing international clients doing business in or out of Malta.

We count as one of our major strengths our long and continuing involvement in international ship finance, an activity which has provided a sound infrastructure for our Firm's banking, finance and insurance work to develop strongly. We have, in parallel with this, directly contributed to the promotion and legislative development of this industry in Malta in order to create and enhance Malta's hard-won reputation as a reliable and effective international centre for financial services – a sector which has assumed greater importance in the country's economic profile especially since Malta's accession to full membership of the European Union in May, 2004.

The firm's financial services and regulatory teams draw on their multi-disciplinary expertise in the legal and regulatory aspects of banking, investments services, insurance and pensions – to mention but a few. The teams service asset managers and their funds, banks, insurers and reinsurers, pension schemes, investment firms, payment service providers, e-money institutions, fintech operators, trade finance institutions and other such operators in the financial services sphere. The teams are supported by our specialist corporate services and governance team focused in particular on supporting the boards of both regulated and non-regulated businesses.

The firm regularly advises on major corporate and capital markets transactions in Malta, for the benefit of international corporate groups and private equity firms. The corporate and capital markets teams provide the full range of transactional corporate legal services in this sector and have long-standing experience in assisting foreign clients in this respect. We have assisted a multitude of international clients with establishing local presence across all commercial sectors. The firm's corporate practice covers the full range of advisory services in this field including the registration of companies and branches, the continuation of companies, corporate restructuring, M&A and related due diligence exercises, privatisations and local investment projects, corporate finance and assistance with initial public offerings both locally and abroad.

Ship registration, ship finance and admiralty law are at the heart of the firm's maritime law practice. Our firm was a pioneer in this field and its specialist maritime lawyers hold leading industry expertise and provide dependable support and advice, making the firm amongst the most established in this area. While very active in the yacht and superyacht space, the firm was also a prime mover in the development of local aviation law; today it regularly advises aircraft financiers, owners, lessors and operators.

GANADO Advocates also has one of the largest and longest-established tax practices amongst Maltese law firms. The firm's multidisciplinary team of legal and tax specialists regularly advises in predominantly international transactions and is regularly involved in transactions structured by or referred to the firm. The tax team advises both corporate and individual high net worth clients, both international and local, on all aspects of Maltese tax legislation and its impact, whether at structuring stage, transactional or on an ongoing basis.

Regularly involved in structuring and providing general legal advice on trusts and foundations, the firm also actively provides ongoing assistance to

various Maltese based (local and international) trustees, administrators of foundations and other fiduciaries on regulatory aspects of their fiduciary activities. It regularly assists private clients with their various legal needs, ranging from estate planning to setting up of trusts (including Private Trust Companies).

The firm's Labour and Employment law practice encompasses the full range of employment services including advice on litigious and non-litigious employment law matters, industrial relations, employment benefits and pensions. While having a practice in its own right, the employment team also provides invaluable support to the other teams within the firm on transactions which span a broad range of areas such as M&A transactions.

The same can be said of our dispute resolution team. Traditionally prominent in commercial and civil litigation the firm has represented clients in some of the largest and most complex commercial and maritime litigation in Malta. This includes arrests and judicial sales of vessels, salvage and other maritime disputes and insurance claims. Today, we also offer highly specialised litigation in the fields of corporate disputes, insolvency, intellectual property, public procurement, competition law, funds, press law and international arbitration.

It must also be said that GANADO Advocates has been at the forefront of the significant developments in the dynamic and ever changing environment and energy sectors in Malta and advises a wide variety of clients on both regulatory and commercial issues, including by drafting and negotiating power purchase agreements, assisting with public procurement, implementing European Union ("EU") Directives into local law and advising on ship-sourced pollution issues. The firm has also experienced increasing interest from industry stakeholders acting as intermediaries in the recycling of hazardous waste on account of Malta's central Mediterranean location, its ratification of the most important environmental Conventions and an efficient and proactive regulator.

Moreover, the firm's intellectual property (IP), media, entertainment and technology practice advises clients on the full range of contentious and non-contentious issues in the technology, media and entertainment space. Services include the registration of trademarks, advice on and drafting of IP agreements, and representing clients in IP infringement lawsuits. The firm leads a project for the Government of Malta bringing together the various Malta-based legal and advisory service providers with a view to overhauling the current IP legal framework and providing solid and innovative legislative solutions to the IP industries, not least those related to blockchain and digital currencies.

The firm's competition and EU law practitioners have gained substantial recognition in this field, advising clients and public authorities in all industry sectors serviced by the firm and frequently also engaging in privatisations and public procurement processes. Besides regularly providing advice on antitrust issues affecting agreements between undertakings and on abuse of dominance, merger control and State aid law, we often represent undertakings in competition investigations and litigation as well as merger notifications.

Many of GANADO Advocates' lawyers and professionals have successfully terminated post-graduate studies at foreign universities and our specialists in one or more of the above practice areas. Our members are not only recognised as leaders in their legal practice areas, but also in the industry sectors which the firm services. Several of our lawyers regularly lecture at various educational institutions, such as the University of Malta, and are often asked to attend as guest speakers in foreign and local fora or are invited to sit on government law review committees and law associations. Our members regularly attend overseas conferences on pertinent academic subjects and some are actively involved in organising local seminars and international conferences.

1.2 The Institute of Legal Studies, Malta

The Institute of Legal Studies, Malta ("ILS") was set up by GANADO Advocates in 2005 to meet the growing demand for education and training in law and its application among the legal and commercial communities in Malta.

To provide its services, ILS draws upon GANADO Advocates' resources, namely the expertise of lawyers and other professionals practising within the firm and its extensive law library. External lecturers, researchers and legal specialists, both local and foreign, are engaged to provide training in highly specialised areas.

The blend of academic and practical knowledge of each course varies according to the particular interests and requirements of participants. The courses are mainly open to the public but they can be tailor-made to suit the specific requirements of participants. The Institute supports research and publishes studies in topical legal areas. It also seeks to develop cross-border links, particularly by encouraging networking on educational and research projects with similar entities and with well-known networks such as Lex Mundi.

ILS is a non-profit making foundation which is enrolled with the Commissioner for Voluntary Organisations.

1.3 Ganado Services Limited

Ganado Services Limited ('GSL') is a leading corporate service provider in Malta that provides an extensive range of services to international and local clients.

GSL is registered as a corporate service provider with the Malta Financial Services Authority (MFSA) in accordance with the Company Service Providers Act, 2013, and as such is subject to regulatory compliance procedures under Maltese law.

GSL has been actively engaged for the last thirty years in offering a broad spectrum of shipping and corporate administrative services ranging from ship administration and registration of vessels under the Malta Flag, registered office services, resident agent and process agent services to full company secretarial services, including the organisation of Board Meetings and Annual General Meetings in Malta. In parallel with the steady development of Malta's corporate governance régime, GSL has dedicated considerable energy and resources over the last few years to providing its clients with full corporate governance services.

Its trained staff perform the necessary day-to-day administrative work relating to the regulatory, technical and administrative upkeep of clients' vessels and owning companies as well as other corporate entities established to carry out the activities requested by clients. They actively operate in conjunction with the corporate and shipping lawyers at GANADO Advocates with a view to providing clients with a wide-based service platform.

Recognising that accelerated timelines are a direct and necessary consequence of commercial realities, prompt attendance to the deliverables that clients expect is a function of the quality service GSL strives to offer. GSL liaises closely with the Registry of Companies to expedite processes and to achieve a turnaround that is both effective and prompt.

GSL's Corporate Services and Governance team constitutes a specialised unit purposely set up to address increasing client demand for the provision of integrated services in the areas of corporate administration services and corporate governance.

1.4 Ganado Trustees and Fiduciaries Limited and Equity Wealth Solutions Limited

GANADO Advocates is affiliated with two separate entities which specialise in the formation and management of Trusts, Foundations and other wealth structuring vehicles for both private and commercial clients. These are Ganado Trustees & Fiduciaries Limited (GTFL) and Equity Wealth Solutions Limited (EWSL).

The senior management of GTFL and EWSL have extensive local and multi-jurisdictional experience in assisting both private and commercial clients and their advisors, in order to establish the optimum wealth management structures that suit client's individual requirements. Both GTFL and EWSL work closely with lawyers of GANADO Advocates, and/or client's lawyers as well as tax professionals to ensure such structures are both robust and fit for purpose whilst complying fully with local and international legislation, regulation and corporate governance best practices.

Both GTFL and EWSL possess skilled and experienced client administration teams, who, under the direction of senior management, handle the day-to-day affairs of high net worth individuals and corporate entities, and offer a full

administration and management service as professional trustees and administrators, managing a wide variety of assets.

CHAPTER 2: THE COUNTRY AT A GLANCE

2.1 Overview

The Maltese archipelago is situated in the middle of the Mediterranean Sea. The distance between Malta and the nearest point in Sicily is 93 Km while the distance from the nearest point on the North African mainland (Tunisia) is 288 Km. Gibraltar is 1,826 Km to the West and Alexandria is 1,510 Km to the East. The Islands have no mountains or rivers; a series of low hills with terraced fields on the slopes characterise the countryside. The coastline of Malta is well indented and provides a variety of sheer cliffs, numerous harbours, bays, creeks, sandy beaches and rocky coves. The total land area of the Maltese Islands is rather small: 316 Km^2. The Islands principally comprise Malta, Gozo and Comino. The length of the shoreline around Malta is 200 Km and 71.2 Km around Gozo and Comino. The geographical co-ordinates of the Maltese Islands are:

Northern Latitude: 36°00′00″ and Eastern Longitude: 14°35′00″.

In 2016, the Islands had an estimated total population of440,433, mainly living in Malta and Gozo, the two biggest Islands. This makes Malta one of the smallest nation-states of the world as well as one with among the highest demographic density in the world today.

The Maltese are predominantly and proudly Roman Catholic and speak a language which is grammatically similar to Arabic in many respects, but uses the Latin script and a vocabulary which is derived from Arabic, Sicilian, Spanish, and latterly, English. Both Maltese and English are official languages, but Maltese is the national language. English and Italian are widely spoken and/or understood.

The Maltese Islands have hardly any natural resources although globigerina limestone, used for construction purposes, is found in abundance and stone quarries dot the Islands. Oil excavations have been carried out on the sister island of Gozo and in the sea around Malta, but to date no satisfactory results have been forthcoming. Indeed, one of the primary limitations on manufacturing industry in general is the availability of natural resources. However, insofar as manpower and expertise are

concerned, Malta has a highly skilled workforce with reliance on expatriates becoming necessary in specific areas of expertise. Malta has its own University, and the number of graduates has been constantly increasing over the past years. Education is free and compulsory between the ages of 5 and 16. The University of Malta (established in 1592) has approximately 13,000 students.

Malta's climate is slightly warmer than that of southern Italy with maximum temperatures rising above 30°C in summer and an average winter temperature of 12°C (and which rarely goes below 10°C except perhaps at night). The climate is predominantly warm and arid in nature, especially during the hot summer months, with occasional stretches of rainfall and stormy weather from November to March. There are really only two seasons in Malta: the dry summer season, and the mild winter season. The average rainfall during a year is around 560 mm.

2.2 History and Culture

Malta's long and colourful history can be traced back to the dawn of civilisation. Remains from the Neolithic period are characterised by the temples dedicated to the goddess of fertility. The Phoenicians, the Carthaginians, the Romans and the Byzantines have all left their mark during their presence on the Islands.

In 60 A.D., while on his way to Rome, St Paul was shipwrecked on this island and he brought Christianity to Malta. In 870 A.D the Arabs conquered the Islands and, during their time as rulers, they left a significant mark on the Maltese language which is still clearly evident up to this day.

The Normans, the Aragonese and other conquerors who ruled over Sicily also governed the Maltese Islands which until 1530 were considered to be an extension of Sicily.

Charles V bequeathed Malta to the Sovereign Military Order of St. John of Jerusalem who ruled over Malta from 1530 to 1798. During their 268 year stay on the Islands, the Knights took Malta through a new golden age, making it a key player in the cultural scene of 17th and 18th century Europe.

The Knights enriched the artistic and cultural lives of the Maltese Islands with the presence of artists such as Caravaggio, Mattia Preti and Favray who were all commissioned to embellish churches, palaces and the Auberges of the Knights.

Napoleon Bonaparte took over Malta from the Knights on his way to Egypt in 1798. The French presence on the islands was, however, short-lived. The English blockaded the islands in 1800 after acceding to the request of the Maltese to help them against the French.

The Maltese adapted the British system of administration, education and legislation. British rule in Malta lasted until 1964 when Malta achieved independence and in 1974, Malta became a Republic within the British Commonwealth. On March 31st 1979, the British military presence on the island officially came to an end.

Until the 1960s, the Maltese economy depended mostly on the British services and the Naval Dockyard. After independence, industry and tourism advanced at a fast pace, and today Malta and Gozo have an established industrial and services economy as well as a thriving tourism sector.

In 1990, Malta applied for membership of the European Union and formally joined the EU in May 2004. In 2008, Malta adopted the Euro as its currency.

2.3 Political System and Scenario – EU Membership

The country adopts the single transferable vote electoral system. Elections take place approximately every 5 years by universal and secret ballot, and it is the Prime Minister's prerogative when to call general elections. All adults of 18 years and over who are Maltese nationals are eligible to vote. The last general elections were held in June, 2017. The next elections are due in 2022. The House of Representatives or parliament is currently made up of 67 elected members, belonging to two main parties: the Malta Labour Party (that holds a centre-left, social-democratic ideology) and the Nationalist Party (that holds a centre-right, Christian-democratic ideology). Government tends to alternate between these two parties although there have been times when small political parties have obtained seats in parliament. Since the last general elections, a new party – the Democratic Party (that holds a centre-left, social-liberal ideology) – is in fact being represented by 2 seats in parliament.

The Malta Labour Party is currently in government, after having been re-elected in the June, 2017 general elections.

2.4 Governmental Structure

In terms of the 1964 Independence Constitution, as substantially amended in 1974, Malta is a constitutional republic. The head of state is the President of the Republic, who is appointed by the House of Representatives to serve for a term of 5 years.

Legislative authority is vested in the House of Representatives, whereas the head of government is the Prime Minister appointed by the President of the Republic from among the party commanding a majority of members in the House. Malta is a parliamentary democracy based on the Westminster model with a Cabinet of Ministers having collective and individual responsibility for the government's decisions. The various Ministers and Parliamentary Secretaries are each appointed by the Prime Minister who also determines their respective Ministerial portfolios.

2.5 International Relations

Malta is a member of the United Nations (UN), the EU and various other international organisations and institutions, including:

- Australia Group
- Commonwealth of Nations
- Council of Europe (CE)
- Economic and Monetary Union (EMU)
- Euro-Atlantic Partnership Council (EAPC)
- European Bank for Reconstruction and Development (EBRD)
- European Investment Bank (EIB)
- Food and Agriculture Organization (FAO)
- International Atomic Energy Agency (IAEA)
- International Bank for Reconstruction and Development (IBRD)
- International Civil Aviation Organization (ICAO)

- International Criminal Court (ICCt)
- International Criminal Police Organization (Interpol)
- International Federation of Red Cross and Red Crescent Societies (IFRC)
- International Finance Corporation (IFC)
- International Fund for Agricultural Development (IFAD)
- International Labour Organization (ILO)
- International Maritime Organization (IMO)
- International Mobile Satellite Organization (IMSO)
- International Monetary Fund (IMF)
- International Olympic Committee (IOC)
- International Organization for Migration (IOM)
- International Organization for Standardization (ISO)
- International Red Cross and Red Crescent Movement (ICRC)
- International Telecommunication Union (ITU)
- International Telecommunications Satellite Organization (ITSO)
- International Trade Union Confederation (ITUC)
- Inter-Parliamentary Union (IPU)
- Multilateral Investment Guarantee Agency (MIGA)
- Nuclear Suppliers Group (NSG)
- Organization for Security and Cooperation in Europe (OSCE)
- Organization for the Prohibition of Chemical Weapons (OPCW)
- Partnership for Peace (PFP)
- Permanent Court of Arbitration (PCA)
- Schengen Convention
- United Nations Conference on Trade and Development (UNCTAD)
- United Nations Educational, Scientific, and Cultural Organization (UNESCO)
- United Nations Industrial Development Organization (UNIDO)
- Universal Postal Union (UPU)
- World Confederation of Labour (WCL)
- World Customs Organization (WCO)
- World Federation of Trade Unions (WFTU)
- World Health Organization (WHO)
- World Intellectual Property Organization (WIPO)
- World Meteorological Organization (WMO)
- World Tourism Organization (UNWTO)
- World Trade Organization (WTO)

Despite being the EU's smallest member state, Malta has, in recent years, hosted a number of high-profile political events that have put it on the European and global map, including the Commonwealth Heads of Government Meeting (CHOGM) and the Valletta Summit Conference on Migration in November 2015, as well as the presidency of the EU during the first 6 months of 2017.

Malta also has a number of Embassies and Consular representations overseas (refer to Appendix A for further details).

2.6 Economic Development

For many years prior to Independence in 1964, the development of Malta's economy was inextricably linked with the British military presence on the Island. Indeed, most of the economic activities were centred on ship-repair, port services and other related industries which were relevant to the British services. Following Independence, the Maltese economy underwent extensive re-structuring, and considerable growth has been experienced in all major sectors of the economy (including manufacturing, tourism and financial and investment services).

In recent years, the maritime, ship registration and financial services sectors have all been given priority through the establishment of Authorities for their regulation and promotion. The traditional sectors, such as agriculture and manufacturing, have given way to new industries. It can be said that international financial services, ICT, iGaming and digital gaming, life sciences, high-value manufacturing, health, education, tourism, maritime services and creative industries now form the cornerstone of Malta's economy and, together with the traditional economic generators, provide a solid base of diverse operations.

Tourism remains a key pillar of the economy, with tourist arrivals usually topping the 1.5 million annually and, in 2016, nearing the 2 million mark, with a robust growth performance registered particularly within the cruise passenger sector. Malta's construction industry has also recently rebounded strongly whilst the internationalisation of the education and health sectors has left an

important mark on Malta's economic growth in more recent years.

Malta's EU and Eurozone membership helped the country strengthen its services sector, and the export of services across EU member states has become a prime driver of economic growth.

Malta's positive economic performance, which is well above the euro area average, can be attributed to the reduction of public debt and deficit and an increase in national savings. In fact, in 2016, the Government's balance turned positive – higher tax revenues, strong corporate profits and increased investment activity were considered to be the key drivers of this achievement. The current favourable labour market conditions as well as proceeds from Malta's citizenship by investment programme were also considered to be contributors to this fiscal surplus.

2.7 Transportation and Communications

Malta has one international airport (known as Malta International Airport or MIA), which operates regular direct flights to the most important destinations within Europe and the Mediterranean basin. Over the past few years, an increasing number of airlines have chosen to start operating flights to and from Malta, which in turn has resulted in a significant increase in the amount of passengers passing through the airport each year. The MIA is also becoming increasingly popular as a hub and stop-over destination for flights coming in from North Africa and the Middle East.

There are two international ports in Malta – at Valletta and Marsaxlokk – providing for a combination of leisure, freight, industry and fishing services. The largest port of the island is the Grand Harbour (Valletta), a natural harbour – scene of a multiplicity of historical events – located in the central part of Malta and facing Sicily to the North. The Grand Harbour is the major hub of shipping services, ranging from ship-repair to dry-docking facilities. The Malta Freeport (Marsaxlokk), which was constructed in the late 1980s to cater for container ships in transit, is assuming ever-increasing importance for the country's economy. Extensive conventional and roll-on/roll-off services by international shipping lines carry freight and cargo from Malta directly to Mediterranean, Northern European, Middle Eastern and Asian ports.

Since joining the EU, Malta's road network has been improved mainly due to a number of major projects funded from EU structural funds, with a further extensive development of the road network planned to be carried out in the years to come. The Government has recently undertaken two major junction projects, as part of its plan for the removal of the most critical traffic bottlenecks on the island's infrastructural network. Such projects form part of the National Transport Strategy 2050 and Transport Masterplan 2025 which were released by Transport Malta and approved by the European Commission in 2016. They present a comprehensive strategy to improve the quality of existing roads and networks, build new ones and incentivise people to use public transport.

Ferry services are increasingly becoming an important mode of transport around Malta. Besides the traditional ferry connection between Malta and Gozo that transports both passengers and goods across the two sister islands, a passenger ferry service is also available within the Port of Valletta (Valletta – Three Cities) and within the Marsamxett harbour (Valletta – Sliema) which is growing in popularity amongs daily commuters as well as tourists.

The Port of Valletta is also the main maritime access to Malta for international passengers who reach the archipelago by travelling on board cruise vessels or the high speed ferry that connects Malta to Sicily.

Malta boasts an excellent communications infrastructure: the international telecommunications infrastructure has been significantly expanded over the years through satellite technology and high-capacity fibre optic submarine cables that link Malta to mainland Europe's communications network. Mobile cellular telephone services are provided by two main operators on the island and the same is the case with digital/cable television services. Internet usage is widespread and engagement among the Maltese in online activities is currently higher than the EU average. Malta performs above EU average in broadband connectivity, the use of digital technology by businesses and the provision of digital public services.

2.8 Future Prospects

Malta also boasts excellent commercial credentials – a stable economic environment and outlook, a well-educated and multi-lingual workforce and an attractive business climate – making it an attractive location for both EU and non-EU investors. The Island has an extensive network of international double taxation treaties which could potentially provide competitive tax advantages to investors.

Strategically located in the centre of the Mediterranean, Malta is a reasonably-priced location where labour costs and the general cost of living are still lower than the EU average. The Maltese workforce has a good educational standard and the legal and accountancy professions are of a very high calibre and very much on par with the corresponding professions outside of Malta.

Malta has secured foreign direct investment in a wide range of areas, including financial services and insurance, digital gaming, high-end manufacturing and aircraft maintenance. In this regard, one of the priorities for Malta is to retain its attractiveness for foreign investment in the wake of initiatives calling for greater tax harmonisation by the European Commission and the OECD, whilst ensuring the development of new economic opportunities.

Nonetheless, projections suggest that economic activity in Malta is expected to remain positive, particularly in view of the energy reforms that have taken place in recent years and the resulting need to invest in related sectors (such as water resource management, waste and renewable energies), increased labour market participation and growing services exports.

The expansion of Malta's logistics sector is currently high on the national agenda and the maritime sector is expected to continue growing with the renewed interest in developing the blue economy. Construction, especially of residential accommodation, is also expected to continue growing at a steady pace. Brexit could result in a favourable relocation of financial services operators to Malta, which in turn would leave a positive mark on Malta's GDP growth. The increased participation of the private sector in economic activity has created a need for more sophistication in the way people work and communicate and further investment in technological innovation and in research and development is expected in the coming years.

2.9 Currency

The official currency of Malta is the Euro.

2.10 Weights and Measures

The metric system applies. A Metrology Act (Chapter 454 of the Laws of Malta) was enacted in 2006.

2.11 International Time

Central European Time (CET) applies in Malta i.e. one hour ahead of Greenwich Mean Time (GMT) and 6 hours ahead of U.S. Eastern Standard Time (EST). In line with CET, Malta officially adopts Daylight Saving Time, which is one hour ahead of normal time, between the last week of March and the last week of October.

2.12 Public Holidays

The country's public holidays are the following:

New Year's Day	1st January
Feast of St. Paul's Shipwreck	10th February
Feast of St. Joseph	19th March
Freedom Day	31st March
Good Friday	Varies
Workers' Day	1st May
Commemoration of the 1919 Uprising	7th June
Feast of St. Peter and St. Paul	29th June
Feast of the Assumption	15th August
Feast of Our Lady of Victories	8th September
Independence Day	21st September
Feast of the Immaculate Conception	8th December
Republic Day	13th December
Christmas Day	25th December

2.13 Industry Bodies

2.13.1 IFSP

The Institute of Financial Services Practitioners (IFSP) is an association made up of professionals representing the entire spectrum of the financial services industry: from lawyers to accountants, bankers, insurers, stockbrokers and trustees. Founded in 1989, the Institute is today a recognised local body that represents the interests of financial services practitioners in Malta, whilst promoting increased cooperation between the various professions and providing a platform for the continuous exchange of ideas.

Specifically, the Institute's main goals are those of:

- promoting continued development of the financial services industry in Malta;
- advancing and protecting its members' professional and business interests;
- developing cooperation amongst members and serving as a focus for a common approach to industry-related issues;
- acquiring, generating and diffusing knowledge on the conduct of financial services;
- developing professional standards for the industry as a whole; and
- maintaining a code of professional conduct and practice amongst its members as well as in its members' relations with the authorities and their clients.

The IFSP acts as a communication medium between practitioners and the regulatory authorities (particularly the Malta Financial Services Authority ("MFSA") and the Ministry of Finance) and is, in fact, regularly consulted by the competent authorities on important issues affecting the industry. It is very active in addressing issues related to taxation and has a good working relationship with the Inland Revenue Department and the International Tax Unit.

Through its Sub-Committees, the Institute maintains constant dialogue with other authorities, such as the Financial Intelligence Analysis Unit ("FIAU"), the Registry of Companies (ROC) and Identity Malta. The IFSP is contacted whenever the authorities – the Government, the regulators or the European Commission – need industry feedback through a consultation process. The response would come through the Institute's Sub-Committees, the responsibility of which is, in such cases, to research issues and draft replies. Furthermore, the Sub-Committees, which are subject to renewal on an annual basis, generate proposals to be sent to the authorities with the scope of improving legal and regulatory matters underpinning the financial services sector.

The IFSP has 5 active Sub-Committees:

- Education Sub-Committee
- Investment Sub-Committee
- Marketing and Ethics Sub-Committee
- Prevention of Money Laundering and Funding of Terrorism (PMLFT) Sub-Committee
- Tax Sub-Committee

GANADO Advocates' Dr Stephen Attard (Partner – Corporate Finance and Tax), and Dr Andre Zerafa (Partner – Investment Services and Funds) are members of the 2017/2018 IFSP Council. Dr Zerafa is also the Chairperson of the Investments Sub-Committee and Dr Anthony Cremona (Partner – Private Client, Trusts and Foundations) is a member of the PMLFT Sub-Committee.

2.13.2 STEP

Society of Trust and Estate Practitioners (STEP) is the global professional association for practitioners who specialise in family inheritance and succession planning. Since its inception in 1991, STEP has grown from a niche society for UK-based accountants and lawyers working with trusts, to a community of more than 20,000 members across the world coming from a range of professional backgrounds.

STEP's emphasis has broadened over the years and trusts are just one part of the wider role members play in advising families on their long-term wealth planning. The Society's primary purpose is, in fact, that of improving public understanding of the issues families face in relation to inheritance and succession planning, whilst promoting education and high professional standards among its members.

STEP provides training and development opportunities, offering a number of qualifications that include entry-level programmes as well as advanced certificates and diplomas. It supplements such qualifications by resources that provide continuing professional development and opportunities for knowledge-sharing.

All STEP members are subject to an extensive Code of Professional Conduct, requiring them to act with integrity and in a manner that inspires the confidence, respect and trust of their clients and of the wider community. In sustaining the Society's high professional standards, all members are required to keep abreast of the latest legal, technical and regulatory developments. Full STEP members, who are known as 'TEPs' (Trusts and Estates Practitioners), are internationally recognised experts in their field, with proven qualifications and experience.

STEP members help families plan for their futures – from the drafting of wills, to ensuring protection and support of the elderly or vulnerable relatives, advising on issues concerning international families, ascertaining that family businesses pass safely from one generation to another and ensuring the support of charitable causes.

STEP takes a leading role in explaining its members' views and expertise to Governments, tax authorities, regulators and the public at large. The Society works with Governments and regulators all over the world to examine the likely impact of any proposed changes, providing technical advice and support and responding to consultations.

All STEP members belong to a branch (or chapter), each ensuring the provision of professional development and networking opportunities at a national level. The Society has over 100 branches and chapters across the world, including a branch in Malta that was founded in October 2007.

Dr Anthony Cremona, Partner in charge of the Private Client, Trusts and Foundations practice at GANADO Advocates, was one of the founding members of STEP (Malta). He was elected as a committee member of the Malta branch in June 2013 and, subsequently, as Chairman in July 2016, which position he still holds today.

2.13.3 FinanceMalta

FinanceMalta is a non-profit public-private initiative, set up as a partnership between the Government of Malta and the financial services industry, to communicate Malta's value proposition as an international business and financial centre. It was founded in May 2007, just 3 years after Malta joined the EU and at a time when Malta was about to enter the Eurozone. Since then, it has contributed towards making the financial services sector a major force in the country's economy and in bringing about the development of cluster formations in certain sectors, particularly asset management, insurance and family wealth business.

The Malta Funds Industry Association, the College of Stockbroking Firms, the Malta Bankers Association, the Malta Insurance Association, the Association of Insurance Brokers, the Malta Insurance Managers Association and the IFSP are FinanceMalta's founding associations that, together with the entity's Board of Governors and its corporate and affiliate members, work together to continue building on Malta's international reputation as a brand denoting excellence in financial services.

FinanceMalta is a member-based organisation that is today represented by over 270 members operating in various sectors of the financial services industry. It brings together and harnesses the resources of the financial services industry and local government, ensuring a modern and effective legal, regulatory and fiscal framework which enables the industry to continue growing and prospering. Its mission is to enhance business opportunities for its members by which the industry can sustain its growth traction. In fact, it frequently organises conferences and business-led events, participates in well-profiled third party international events, and manages a concerted range of other initiatives across key media and communication channels (supported by strong public relations programmes) to strengthen the visibility of Malta in Europe and beyond, whilst serving as a platform for the creation of networking opportunities for its members.

In addition to the media-driven promotional and business development initiatives that FinanceMalta organises throughout the year, educational programmes still play a key role to the entity's overall strategy. A number of educational clinics are organised annually covering topics relevant to FinanceMalta members, including clinics on the European Market Infrastructure Regulation (EMIR), wealth management, funds, pensions, Islamic Finance and many others. Furthermore, FinanceMalta holds various meetings with honorary consuls, ambassadors, business delegations, prospective investors and also hosts a number of foreign journalists in Malta.

Dr Matthew Bianchi, Partner in charge of the Insurance practice at GANADO Advocates, represents the Maltese insurance industry as Governor on the Board of FinanceMalta.

2.13.4 Malta Marittima

Malta Marittima' is a Government of Malta agency that was established through Legal Notice 41 of 2016. One of the Agency's main objectives is to bring industry and government stakeholders together so as to focus and promote the continued and enhanced development of the marine and maritime industries in the Maltese Islands.

The Malta Marittima Act provides for the establishment of a corporate body with a separate and distinct legal personality to which the Government of Malta may assign relevant functioning parameters and/or operational processes. This feature is of particular relevance for Malta Marittima in assuming the responsibility of representing Malta as the EU Focal Point for the Integrated Maritime Policy, as well as its related regulations and its initiatives. As an agency, Malta Marittima has an enhanced level of transparency and accountability in compliance with the Financial Administration and Audit Act (Cap174, Laws of Malta).

Malta Marittima has a steering committee made up of five directors nominated from within the public sector, namely Transport Malta, Department of Fisheries and Aquaculture, Malta Freeport Corporation, Regulator for Energy and Water

Systems, and Malta Enterprise.Another five directors are appointed by government through a consultation process with industry stakeholders.

The Chairperson, together with the steering committee and the industry representatives constitute the Board of the Malta Marittima Agency. Dr Daniel Aquilina, Ship Finance Partner at GANADO Advocates, is at present the Chairman of the Agency.

In addition to the above structure, Malta Marittima is supported by a specialised team of executives who coordinate the related policies which concern education and research, environment, spatial planning as well as safety and surveillance. The executive team is also tasked with the provision of support to the 'clusters' which themselves address the diverse array of activities in the marine and maritime domains. In line with the Integrated Maritime Policy, the establishment of Malta Marittima brings the business and non-business members together, in sectoral clusters. Each sectoral cluster is comprised of businesses, industry associations, government departments and academic and research institutions.

There is a wide range of companies and organisations already active in maritime industry; services vary broadly and include financial (e.g. insurance), yachting and marina management, consulting and legal, logistics, transportation, and aquaculture. The grouping of these activities holds potential for establishing a number of closely-knit maritime clusters. Maritime clusters have been promoted globally for several years and the European Commission sees maritime clusters as having a pivotal role in the strengthening and development of the maritime sector.

The maritime sector encompasses an immense variety of activities that are indirectly linked to the sea. Ancillary and associated maritime support services are significantly far-reaching and hold considerable inherent potential for Malta's economy and the labour market.

The Prime sectoral clusters that have been proposed are the following:

(i) Maritime Commercial Cluster – Legal, Financial, Insurance, Broking, Chartering, Ship Owners, Surveyors, Adjusters, Crew Management;

(ii) Logistics Cluster – Freight Forwarders, Terminal Operators, Ship Agents, Warehouse Operators, Bunkering;

(iii) Marine Engineering Cluster – Marine Engineering, ICT, Ship Repair, Technical Services Mechanical and Electrical, Sailing and Motorboat clubs, Marinas, Boat Sales/Chartering;

(iv) Fisheries and Aquaculture Cluster – Fishing Boat Owners, Fishing Coops, Fish Farming, Aquaculture, Fish Processing, Fisheries Management and Biotechnology;

(v) Energy Cluster – Oil & Gas Exploitation and Servicing, Offshore Renewables, Emissions.

CHAPTER 3: INCENTIVES FOR FOREIGN INVESTMENT AND EXCHANGE CONTROLS

3.1 Incentives under The Malta Enterprise Act

The Malta Enterprise Act (the "MEA"), Chapter 463 of the laws of Malta, was enacted to cater for the establishment of a corporation in Malta, Malta Enterprise, which is tasked with the promotion, establishment and expansion of business undertakings in Malta, as well as with providing for the development and administration of incentives and schemes for inbound investment. This economic development agency acts as an advisor to the Government of Malta on economic policy and is the national contact point in Malta for the Enterprise Europe Network, through which companies based in Malta can develop links with counterparts in over sixty countries.

Upon joining the World Trade Organisation ("WTO") Malta shifted its economic strategy from export-oriented incentives to one of attracting new investment projects which have a high value added component or high employment potential. Furthermore, following Malta's accession to the EU, incentive schemes have also been aligned to the EU guidelines on state aid. It is key to note that the incentives previously found under the Business Promotion Act, Chapter 325 of the laws of Malta have been largely absorbed into the MEA and the subsidiary legislation enacted under it.

More information on a number of support measures can be found online including on the Malta Enterprise website as available at <https://www.maltaenterprise.com/support>.

3.2 Tax Incentives under the MEA

The main incentives under the MEA consist of tax credits calculated, either:

- as a percentage of the capital investment, typically utilised by capital intensive enterprises; or
- by reference to the value of wages covering new jobs created consequent to an investment project.

Tax credits are set-off against the income tax due by the enterprise for that year. Any unutilised

credits may be carried forward and offset against income tax for the following years, in which case the investment tax credit is increased at such reference rate as established by guidelines issued under the MEA.

The MEA also provides for tax credits in respect of eligible costs incurred by an enterprise in running industrial research projects and experimental development projects. Enterprises must seek approval of any research and development ("R&D") project prior to commencement. Tax credits may only be provided on allowable expenditure which is pre-approved.

The following measures are the tax incentives available under the MEA at the present time. It is key to note that Malta Enterprise issues and publishes on its website, detailed incentive guidelines for each incentive, outlining *inter alia,* the eligibility criteria and duration of the relevant scheme as well as the applicable aid awarded by the incentive.

Innovation Aid for SMEs

Innovation Aid is one of the many incentives targeting qualifying SMEs. It allows these undertakings to recover in the form of tax credits, part of the costs incurred for the secondment of highly qualified personnel from large undertakings and Research and Knowledge-dissemination Organisations. The latter term refers to entities whose primary objective is to either conduct industrial or experimental research independently, or to disseminate the results of such research through academic publication, education or

training. The beneficiaries of the scheme might be able to recoup up to fifty per cent of the eligible costs.

Investment Aid Tax Credits

The rationale behind this measure is to sustain the regional industrial and economic development of Malta. The tax credits, which are calculated as a percentage of the qualifying expenditure incurred

by eligible entities, are intended to facilitate initial investments made by large undertakings, by encouraging them to set up new economic activities and to expand and develop their existing businesses. The investment for which the aid is awarded must remain in the region of Malta for at least five years or for three years if the beneficiary is an SME.

Aid for Research and Development Projects (Tax Credits)

This scheme grants eligible beneficiaries a tax credit on costs incurred in carrying out R&D projects relevant to their trade, and which contribute towards scientific or technological advances in their business. Beneficiaries carrying out the eligible R&D activities will be able to recover twenty-five percent of the eligible expenditure which percentage is increased by ten per cent if the applicant is an SME and by twenty per cent if the applicant is a small enterprise (as defined in the regulations issued by Malta Enterprise).

Business Development and Continuity

Malta Enterprise caters for the development and continuity of a business already established in Malta by awarding significant tax credits or cash grants of up to 200,000 to entities embarking on an expansion project or a merger. When awarding such grants or credits, Malta Enterprise takes into consideration the potential benefits to the Maltese economy of the relevant project as well as its employment potential.

Tax Credits for R&D and Innovation

This incentive grants a tax credit of up to 10,000 to undertakings which employ persons who are reading for or are already in possession of a doctoral degree in science, information technology or engineering. The eligible applicants would be entitled to claim this tax credit once they will have been in employment for the minimum time-period prescribed by the regulations.

Micro Invest

Through Micro Invest, Malta Enterprise grants eligible undertakings the possibility to claim a tax credit equivalent to forty-five per cent of eligible expenditure and wages costs. Enterprises in Malta, particularly start-ups, family businesses and self-employed persons, are thus encouraged to invest in and innovate their business model, and further develop their operations. As outlined in the incentive guidelines, eligible costs may also include expenses related to the furnishing or refurbishing of business premises and the costs related to the acquisition of modern technologies or systems to make the business more energy efficient.

3.3 Non-Tax Incentives

The MEA also caters for several non-tax incentives which are available to qualifying companies, including:

- soft loans;
- loan interest rate subsidies;
- loan guarantees;
- incentives for job creation;
- training grants; and
- factory space at competitive prices.

One is encouraged to refer to the incentive guidelines issued by the Malta Enterprise for further details on all incentives described in this guide. Moreover, it is pertinent to highlight that the availability of the schemes described herein is subject to open calls announced by Malta Enterprise.

Business START

Malta Enterprise, via Business START, offers seed funding for start-ups. This initiative is aimed at sustaining small start-up undertakings which are in the process of establishing or consolidating their business concept. The eligible undertakings which have a viable business model and which have been deemed economically feasible and innovative by Malta Enterprise will be supported through a cash grant capped at 25,000.

Start-Up Finance

Another initiative which is targeted at incentivising innovative, small and new undertakings is the Start-Up Finance scheme. Eligible applicants, which must be incorporated in the EU and operating from Malta, will benefit from a repayable grant if these manage to demonstrate a viable business concept

in their initial growth phase. The maximum assistance given under this measure may not exceed the nominal value of paid up share capital held by the private parties, or 200,000, whichever is the lowest.

Micro Guarantee Scheme

Start-up businesses and small enterprises are often faced with restricted opportunities for traditional debt funding and this may lead to loss of business opportunities. The Micro Guarantee Scheme is a measure which is intended at accelerating growth by facilitating access to debt finance, particularly to self-employed traders, start-ups and family businesses. Purposely launched to support the taking of new loans required to finance eligible costs, this incentive grants eligible undertakings a guarantee of up to seventy per cent of loans required to finance business enhancement, growth and development.

Soft Loans

The objective of the soft loans incentive is to support undertakings by means of loans at low interest rates to part-finance investments in qualifying expenditure. The loans, which are available to manufacturing enterprises, are capped at seventy-five per cent of the cost of the plant, machinery and equipment.

Loan Guarantees

The Loan Guarantees scheme is an access to finance tool which is aimed to assist enterprises in the acquisition of capital assets. Ultimately, this will help undertakings increase their competitive edge and their innovative capacity. This will in turn lead to more effective and efficient production and supply of services.

3.4 Other Incentives

In addition to the support measures launched by Malta Enterprise under the MEA, businesses in Malta could reap the benefits of various initiatives and schemes launched by other governmental entities. The below incentives, all aimed at supporting the private sector, seek to enhance the development of a more business friendly environment and to cultivate solid and competitive businesses in Malta.

Business Enhance ERDF Grant Schemes

The Ministry for European Affairs and Implementation in Malta launched the Business Enhance - European Regional Development Fund ("ERDF") schemes. ERDF, which is a fund allocated by the EU, provides several different support measures through which enterprises are awarded grants aimed at supporting their investment projects. This will augment as well as secure business growth by helping such enterprises become more competitive, innovative and resilient to market changes. The following is a list of some of the schemes launched under ERDF, which are available subject to open calls:

(i) Start-Up Investment Grant Scheme

Start-up businesses are highly exposed to the risk of failure in their primary phase, owing to the initial funding hurdles. This initiative supports undertakings to overcome these challenges by providing fifty per cent part-financing to cover the eligible expenditure related to their initial productive investment costs.

(ii) SME Growth Grant Scheme

This support measure financially assists Small and Medium Sized Enterprises ("SMEs") by part-financing eligible expenditure related to the implementation of their growth strategy. Under this incentive, small and micro enterprise are partly-financed for thirty-five per cent of eligible costs while medium companies are partly-financed for twenty-five per cent of eligible expenses. The grant awarded is capped at 500,000.

(iii) SME Diversification and Innovation Grant Scheme

This scheme incentivises and supports SMEs to make fundamental changes towards the diversification of the output of products or services. It helps undertakings to invest, adapt and become more efficient in dealing with market challenges to avoid dire consequences. This support measure comprises a grant capped at 200,000, with an aid intensity of up to fifty per cent of the eligible expenditure.

MIMCOL Investment Schemes

Seed Investment Scheme

Malta Investment Management Company Limited ("MIMCOL") is a Government-owned agency, falling within the responsibility of the Ministry for the Economy, Investment and Small Business. MIMCOL provides consultancy and professional support to a range of public and parastatal entities. The Seed Investment Scheme was introduced to assist start-ups in raising equity finance. Through this scheme, individual investors who are resident in Malta or are operating in Malta and invest in a start-up business are offered tax relief in the form of tax credits. The

tax credit available amounts to thirty-five per cent of the aggregate value of the investment made.

MITA Innovation Hub Investment Schemes

YouStartIT

The Malta Information Technology Agency ("MITA") launched a government-funded incubator called MITA Innovation Hub, whose objective is to provide opportunities for students or start-ups to kickstart a business through technology. As a digital start-up ecosystem, MITA Innovation Hub offers a pre-seed investment of 22,000, which is granted on the basis that tech start-ups develop an innovative solution which addresses either a defined problem executed through digital technologies or the learning of financial literacy and science through games.

3.5 Qualifying Activities

It is apparent from the respective incentive guidelines that every investment scheme has certain qualifying criteria which applicants must meet in order to be eligible for that scheme. The most common qualifying prerequisite (although not a requirement for all schemes) is that the enterprise is incorporated in Malta under the Companies Act, Chapter 386 of the laws of Malta, be it as a partnership *en nom collectif* or *en commandite* or as a limited liability company.

There are other schemes which require that the applicant simply operates from Malta as long as the enterprise is incorporated in the EU as a partnership *en nom collectif* or *en commandite*, or as a limited liability company. Certain support measures are also available to applicants who are either self-employed individuals or entities which are registered as cooperatives under the Co-operatives Societies Act, Chapter 442 of the laws of Malta.

It should be mentioned that most schemes are only available to SMEs as they are aimed at helping such enterprises survive ultimately promoting competition and economic growth.

3.6 Exchange Controls

Exchange control limitations have been abolished in Malta and Maltese persons may enter into foreign currency transactions without limitation. The only requirement in this regard is that statistical data relating to certain foreign currency transactions is submitted by Maltese credit institutions on the appropriate forms to the Central Bank of Malta in terms of the External Transactions Act, 1972 (Chap. 233 of the Laws of Malta). Failure to so notify the Central Bank of Malta will not impinge on the ability of the non-Maltese counterparty to claim payment and will have no impact on the validity of the underlying transaction.

There are two exceptions to this rule relating to (i) exceptional circumstances, namely a sudden crisis in Malta's balance of payments or serious difficulties for the stability of the financial system; and (ii) powers under the National Interest (Enabling Powers) Act (Cap. 365 of the Laws of Malta).

In the event that for any reason a party needs to prove / claim in a Maltese liquidation, the solvent party's claim must be expressed in Euros.

CHAPTER 4: LEGAL SYSTEM AND DISPUTE RESOLUTION

Maltese law is founded on Roman Law and is predominately civil in nature, with Codes of law principally based on the Code Napoleon. French and Italian laws were a dominating influence on our own laws but from the nineteenth century onwards English statute law also began to be grafted onto existing laws. Thus, the Criminal Code which was enacted in 1854 (and has been amended many times since then) is one of the law codes most influenced by English legal principles, several of which have been fully adopted, such as the jury system. Over the years, Parliament increasingly enacted legislation in line with British statutes (especially in the field of public and company law) and, more recently, European law, and this has resulted in a "mixed" or "hybrid" system.

It should be added that English judicial precedents or case law generally have significant influence with our courts when there are no customs or usages of trade or other provisions in the Codes or laws to regulate an issue. In our case, however, judicial precedent is not binding on our courts.

As a result of common recognition and judicial adoption, all public law is based on English law and, in case of any *lacunae* in our public law, reference is made to English law. The same occurs in the case of private international law where the English common law is directly applied as the law of Malta except where a question falls within the scope of EU Regulations on jurisdiction, applicable law and recognition of judgment or where law or judicial trends consistently adopt different conflicts of law principles. However, English Common Law has never been applied in Malta, except in the public law areas.

Maritime law, including admiralty law, and general commercial law, including company law, is also very much influenced by English law. For example, the Maltese "Companies Act, 1995" is similar to the British "Companies Act, 1985" and the "Insolvency Act, 1986". The extensive package of Maltese financial services legislation—introduced in 1994 and later—is consonant with the relative EU directives on the relevant subjects. During its accession negotiations with the EU, Malta "screened" its laws together with the European Commission and revised them in line with European law. The implementation of this screening process was practically concluded by the time Malta became a full member of the EU in May, 2004.

Malta has sought to attract business to its shores by various methods, including the passing of legislation in and for various sectors. As a result, incentive legislation for industry, shipping (company, vessel and mortgage registrations), freeport activities and international companies has been passed over the years.

4.1 Judicial System

The Constitutional Court is the highest Court in Malta dealing with constitutional issues. Parties enjoy the right to appeal to the European Court of Human Rights from a judgement of the Constitutional Court.

The Court of Appeal (made up of 3 Judges) has both Civil and Criminal jurisdiction. The Superior Courts (made up of Judges) decide both civil and commercial cases with claims amounting to more than 15,000 and certain other cases according to subject-matter. There are no proceedings at the third instance in Malta such as a Court of Cassation or a Supreme Court, and this makes the Court of Appeal the highest court of the country.

The present structure of the Family Section of the Civil Court came into being in December 2003, when the Civil Court was split up into three sections: the General Jurisdiction Section (also known as the First Hall of the Civil Court), the Family Section and the Voluntary Jurisdiction Section.

The Inferior Courts (made up of Magistrates) decide on civil and commercial cases involving claims of an amount below 15,000 and lesser criminal cases. They also have the functions of a court of criminal inquiry. A Small Claims Tribunal, competent to decide on monetary claims

amounting to not more than 5,000 was set up in 1998.

The independence and impartiality of the Judiciary is guaranteed by the Constitution and demanded by the principles of natural justice which have been themselves regularly upheld by the Maltese courts.

4.2 Dispute Resolution

4.2.1 Litigation in the Courts of Justice of Civil Jurisdiction

Court litigation is the default method for the settlement of controversies of disputes between and among persons in Malta. The courts of law of Malta and Gozo are divided into courts of civil jurisdiction and courts of criminal jurisdiction. We will focus exclusively on civil jurisdiction in this Guide.

The Courts of Justice of civil jurisdiction are divided into superior courts and inferior courts.

The superior courts are:

- the Civil Court;
- the Court of Appeal in its superior jurisdiction; and
- the Constitutional Court.

The inferior courts are:

- the Court of Magistrates (Malta) for the Island of Malta;
- the Court of Magistrates (Gozo) for the Islands of Gozo and Comino;
- the Small Claims Tribunal;
- the Court of Appeal in its inferior jurisdiction.

The jurisdiction of the superior courts is general for Malta whilst the jurisdiction of the inferior courts is limited to particular places.

It is also important to point out that an Administrative Review Tribunal has been set for the purpose of reviewing administrative acts of the public administration on points of law and points of fact. It is also competent to decide disputes referred to it unless any court or other administrative tribunal is already seized of such dispute. Apart from this, the courts of justice of civil jurisdiction may enquire into the validity of any administrative act or declare such act null, invalid or without effect where the administrative act is in violation of the Constitution of Malta; and when the administrative act is *ultra vires* on certain grounds laid down in the law.

There is also a Consumer Claims Tribunal and it is presided by an single arbiter. The Consumer Claims Tribunal hears and determines claims made by consumers against traders where the value of the claim, exclusive of interests and costs, does not exceed EUR 3,500, and where the claim relates to, arises out of or concerns: (a) the purchase or hire of goods by a consumer from a trader; or (b) the provision of services by a trader to a consumer. It is important to note that this particular tribunal's jurisdiction is not exclusive, and this means that the consumer has the option to decide whether to bring an action against a trader before this tribunal or before the Small Claims Tribunal.

Maltese statute has also established a host of other specialised tribunals presided by persons who have the required competence to deal with specific issues, such as the Tribunal for the Investigation of Injustices, and the Industrial Tribunal.

The Maltese language is the language of the courts and proceedings are conducted in Maltese subject to any exceptions which may be laid down in any relevant law. However, if any party to a lawsuit does not understand the language in which the oral proceedings are conducted, such proceedings are be interpreted to him by the court or by a sworn interpreter.

Cases are generally heard in public.

(i) The Superior Courts

(a) The Civil Court

The Civil Court is divided into sections and these are currently the Family Section, the Voluntary Jurisdiction Section and a general jurisdiction section which is called the First Hall of the Civil Court. One (1) Judge sits in each section.

The Civil Court deals primarily with cases of a civil and commercial nature, and other cases which may be expressly assigned by law to the Civil Court.

The Civil Court (Family Section) is sometimes referred to as the Family Court and it concerns itself exclusively with family law. It focuses on marital separation cases, divorce cases, annulment of marriage, issues relating to filiation, parental authority, maintenance of children and other issues relating to marriage, children and family. In Gozo, matters which would be dealt with in Malta by the Family Section of the Civil Court are dealt with by the Family Section of the Court of Magistrates (Gozo) in its Superior Jurisdiction. A system of compulsory mediation before mediators was also introduced some years ago as part of the set up of the Family Section of the Civil Court. Lastly, where the Court considers it expedient to do so, either of

its own motion, or at the request of the mediator, or of either of the spouses, it may appoint a children's advocate to represent the interests of any minor children of the parties if the case happens to involve children.

The Civil Court in its voluntary jurisdiction tackles demands for any authorization or leave to enter into or make any contract or disposition in respect of which the law requires a previous authorization or leave, adoption proceedings, disentail, liberation of any immovable property from burdens, for the appointment of a tutor or curator, or of any other administrator, according to law, demands for the interdiction or incapacitation of persons, declarations of the opening of succession. No appeal shall lie from any decree of the Court of Voluntary jurisdiction; but any party, who deems himself aggrieved, may bring an action before the Civil Court, First Hall, for the necessary order. The above indicates that its main function is to oversee and protect certain rights and interests, which for some reason or other are not exercised or not exercisable by the person to whom the right or interest appertains and this court does not in principle, hear and decide cases of a contentious nature.

The First Hall of the Civil Court deals with all cases within the Civil Court's competence that are not assigned to the Family Section or the Voluntary Jurisdiction Section. Judgments of the Civil Court, First Hall, are subject to appeal to the Court of Appeal. It determines all claims of an amount exceeding 15,000. The First Hall of the Civil Court would, amongst other things, handle claims for debts which exceed the said amount, questions relating to immovable property, maritime claims, claims relating to aircrafts and alleged breaches of fundamental human rights.

As indicated above, the Court of Magistrates (Gozo) also has superior jurisdiction since it takes cognizance of cases which are triable by the Civil Court. It is divided into two (2) sections, that is, "The Family Section" and "The General Jurisdiction Section".

(b) The Court of Appeal in its superior jurisdiction

The Court of Appeal consists of one (1) or more chambers and each one consists of the Chief Justice and two (2) other of judges. It basically hears and determines all appeals from judgments of the Civil Court, First Hall and the Court of Magistrates (Gozo) in its superior jurisdiction.

(c) The Constitutional Court

The Constitutional Court is composed of either one (1) judge in first instance or three (3) judges in second instance (appeal). As an appellate court it hears appeals from decisions of other courts on questions relating to the interpretation of the Constitution and on the validity of laws, as well as appeals from decisions on alleged breaches of fundamental human rights. As a court of first instance, it decides questions concerning the validity of the election of members of the House of Representatives, the requirement in certain cases for a member to vacate his seat in the said House, and the validity of the election of the Speaker from among persons who are not members of the House. As a court of original jurisdiction the Constitutional Court also decides questions concerning the validity of general elections, including allegations of illegal or corrupt practices or foreign interference in such elections. No appeal lies from a decision of the Constitutional Court given in its original jurisdiction.

(ii) The Inferior Courts

(a) The Court of Magistrates (Malta)

The Court of Magistrates (Malta) is presided by one (1) magistrate. As a court of first instance, hears and determine all claims of an amount not exceeding 15,000. It may also take cognizance of other causes expressly assigned to it by law.

(b) The Court of Magistrates (Gozo)

The Court of Magistrates (Gozo) is also presided by one (1) magistrate. It deals with all claims against persons residing or having their ordinary abode in the Island of Gozo or Comino, as well as of all other causes expressly assigned by law to this court. This court has a two-fold jurisdiction, namely an inferior jurisdiction because it takes cognizance of all causes of the nature of those which are triable by a magistrate for the Island of Malta; and a superior jurisdiction.

(c) The Small Claims Tribunal

Apart from the above there is a Small Claims Tribunal which only has jurisdiction to hear and determine all money claims of an amount which does not exceed 5,000. The Small Claims Tribunal is presided by one (1) adjudicator. The adjudicator is required to ensure that a case is heard and decided summarily, as far as possible, on the same day of the hearing and that the hearing shall not take longer than one sitting subject to any exceptions that may be laid down in the law.

(d) The Court of Appeal in its Inferior Jurisdiction

The Court of Appeal hears and determines appeals from judgments of the Court of Magistrates (Malta)

and Court of Magistrates (Gozo) and decisions of the Small Claims Tribunal and other Tribunals in its inferior jurisdiction.

(iii) Trial

The hearing of Maltese proceedings is mostly adversarial. The first court sitting at first instance is usually a case management hearing where it is ascertained that all parties have been served with the lawsuit and where the hearing of the case is set by the presiding judge. It is mostly practice for the hearing of a lawsuit to be usually conducted through a number of consecutive court sittings scheduled from sitting to sitting based on the availability of the court and the parties.

(iv) Production of Evidence

There are three general rules in Maltese law underpinning the production of evidence.

The first rule is that all evidence must be relevant to the matter in issue between the parties. This implies that any evidence which the Court will consider to be superfluous to the issue may be either disregarded or, in extreme circumstances, excluded from the court file.

The second rule is that the court will only accept the best evidence that can be produced by the party. This is relevant in the case of documentation to be submitted, where if an original copy exists and is attainable, the court will not accept a copy thereof and in the case of witnesses it will, subject to certain rules, disregard hearsay evidence from a witness if direct evidence can be produced.

The third rule in the law of evidence is that the burden of proof, in principle, rests with the party alleging the fact. The burden of proof in Maltese civil proceedings is one which must satisfy a balance of probabilities.

There is no duty of full disclosure of documents at pre-trial stage, although the law does provide for a very limited right to request production of documents from a specific party or witness.

All witnesses of sound mind and of age are admissible to be produced and heard by a court in Malta. The witness is first examined, viva voce (orally) in open court during the trial by the party producing the witness or alternatively by means of an affidavit. The counter-party is allowed to cross-examine the witness.

The Maltese Courts are very familiar with Council Regulation 1206/2001 on cooperation between courts of Member States in taking of evidence in civil or commercial matters and the Hague Convention of 18 March 1970 on the Taking of Evidence Abroad . The Maltese courts frequently assist foreign courts based in other jurisdictions in the hearing of witnesses residing in Malta on the back of a letter of request via audio or video link.

(v) Interim Relief

During judicial proceedings in Malta and in another EU/EEA Member State, a claimant may obtain the following interim measures before a Maltese court of law in support of those proceedings:

- Warrant of description. Following an application for a warrant of description, a Maltese court may order a court official to draw up an inventory describing in detail the things forming the subject matter of the warrant (which must be movables and tangible in nature, and include bearer securities) by stating their quantity and quality. The Maltese Courts may also order that the things forming the subject matter of the warrant remain in the custody of the person in whose possession they are found.
- Warrant of seizure of movables. A warrant of seizure orders the seizure of a debtor's property under court authority with a view for it to be sold by means of a court approved public auction (i.e. after an executive title is obtained such as a judgment on the merits).
- Warrant of seizure of a commercial going concern. A warrant of seizure of a commercial going concern is issued to preserve the totality of the assets of the going concern by ordering that those assets are not sold in part or in whole and are to be concurrently kept in business;
- Garnishee order. A garnishee order would require that moneys or movable property held by third parties (including banks and investment firms) for a debtor are attached and deposited in court. There is no need for the creditor to identify a specific bank account or investment account for the debtor and the garnishee order may be issued in respect of any third parties based in Malta.
- Warrant of prohibitory injunction. An application for a warrant of prohibitory injunction is a demand for a person to be restrained from doing or refraining from doing anything which might be prejudicial to the person filing the application for the issuance of the warrant.
- Warrant of arrest of sea vessels / aircraft. Such warrants, when issued, order that the

sea vessel or aircraft in question is seized and attached under the control and power of the Authority for Transport in Malta.

These interim measures may only be issued if the essential requisites particular to each warrant are satisfied and each warrant is subject to any procedural formalities or exceptions provided by law. The applications for all such measures are essentially ex parte applications which are upheld without a hearing and within a span of forty-eight (48) hours. The exception to the rule is the application for a warrant of prohibitory injunction which is provisionally upheld within forty-eight (48) hours, but subject to a summary hearing before the First Hall, Civil Court.

The above-mentioned interim measures may also be applied for before initiating judicial proceedings, but once the application is upheld, the claimant must initiate the proceedings within a time period of 20 days.

As observed above, these interim measures may be applied for in support of judicial proceedings in Malta or in another EU Member State under the Brussels I Recast Regulation. It is also practice for the First Hall, Civil Court to uphold applications for such interim measures in support of arbitration proceedings with a seat in a jurisdiction other than Malta.

Once a judgment is delivered and it is final and definitive, the interim measures applied for above (except for the warrant of prohibitory injunction) may be converted to an enforcement measure and may lead to a judicial sale by auction.

4.2.2 Alternative Dispute Resolution

Arbitration

Arbitration has been defined as a mode of settlement by referring a dispute to a tribunal of the parties' own choice without them having to resort to a court of law. Arbitration as an alternative means of dispute resolution is not alien to Maltese Law as the aim of successive government administrations has always been to reduce the burden of cases encumbering Maltese Courts and hence to strive to find a substitute for the customary mode of dispute settlement.

The Arbitration Act (Chapter 387 of the Laws of Malta, the "Arbitration Act") lays down a legal framework for arbitration proceedings together with the establishment of an overseeing institution referred to as the Malta Arbitration Centre (the "MAC") which is situated in Valletta. This was set up to promote and encourage the conduct of domestic arbitration and international commercial arbitration.

The Arbitration Act creates an institution vested with a number of powers and responsibilities related to the running of arbitrations. The authority, known as the MAC, has defined powers which are vital to the proper functioning of the whole arbitration process.

The MAC is administered by a Board of Governors. This Board consists of not less than three and not more than five members which are so appointed for a period of six years, and is responsible for the policy and general administration of the affairs and business of the MAC. Members are appointed for a six-year term and may be re-appointed for an extended term. A person cannot be appointed Chairman or Deputy Chairman of the Board unless he has practised as an advocate in Malta for a period or periods amounting in the aggregate to not less than twelve years and must have had experience of and shown capacity in matters relating to international or domestic arbitration, conciliation and the settlement of disputes, international trade, commerce, industry, investment and maritime affairs. Legal representation of the MAC vests in the registrar.

The MAC may draw up panels of arbitrators for both domestic and international commercial arbitration.

International Commercial Arbitration

Part V of the Arbitration Act deals with international commercial arbitration. It incorporates into Maltese Law, the UNCITRAL Model Law on International Commercial Arbitration. The parties to an international commercial arbitration may choose to exclude the operation of the Model Law, and apply their own rules or the Arbitration Act's provisions on domestic arbitration. Indeed, if they do choose to apply the said provisions, there is no obligation to register the award with the MAC. The setting aside of an award delivered under Part V is determined by the provisions of the Model Law, as are the grounds for refusing recognition or enforcement. In this respect, the Arbitration Act appoints the Court of Appeal as the competent Court to which a party applies for the recognition and enforcement of such an award.

The Arbitration Act, in its Second Schedule, incorporates, into Maltese Law, the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the 1923 Geneva Protocol on Arbitration Clauses and the 1927 Geneva Convention on the Execution of Foreign Arbitral Awards. The Third Schedule to the Arbitration Act incorporates the 1965 Washington Convention on

the Settlement of Investment Disputes between States and Nationals of other States. The Arbitration Act provides that ICSID awards shall be recognized and enforced by the Courts of Malta as if such awards were final judgments under the laws of Malta. The Malta Arbitration Centre is designated as the competent authority to receive certified copies of the award when a party seeks recognition or enforcement in Malta.

Mediation

The government body responsible for mediation in Malta is the Malta Mediation Centre (the "MMC"), which was established under the Mediation Act (Chapter 474 of the Laws of Malta, the "Mediation Act").

The MMC provides a forum in which parties to a dispute may refer, or be referred, to resolve their dispute with the assistance of a mediator. Mediation is admissible in disputes involving civil, family, social, commercial and industrial measures. Mediation should be a voluntary process in the sense that the parties are themselves in charge of the process and may organise it as they wish and terminate it at any time. However in terms of Article 173 of the Code of Organization and Civil Procedure (Chapter 12 of the Laws of Malta), parties to any proceedings may jointly request the court to stay proceedings while the parties attempt to settle their dispute by mediation or the Court may, at its own initiative, stay the proceedings for the duration of the process and direct the parties to try and settle the dispute by mediation.

It is to be noted that mediation in family cases is mandatory, notably in cases dealing with personal separation, access to children, the care and custody of children and maintenance for children and/or spouses. In family mediation, the parties can either freely choose a mediator (from the accredited list) and thus bear their own costs for choosing a mediator, or the Court Registrar may appoint one of the mediators, on a rota basis, from a list forwarded by the MMC. In the latter case the cost is borne by the courts.

In order to maintain flexibility of the mediation process and the autonomy of the parties the Mediators are subject to a Code of conduct which ensures that the mediation is conducted in an effective, impartial and competent way. However where a mediator deems that there is a conflict of interest giving rise to the slightest reasonable doubt as to the integrity of the process, the mediator shall decline to proceed regardless of the consent of the parties to the contrary.

Directive 2008/52/EC was transposed into Maltese Law by virtue of the Mediation Act which provides that it must be possible to request that the content of a written agreement resulting from mediation be made enforceable subject to the provisions of the Code of Organization and Civil Procedure (Chapter 16 of the Laws of Malta). The content of the agreement may be made enforceable by a court or other competent authority in a judgement or decision or in an authentic instrument in accordance with the law of the Member State where the request is made.

The function of the MMC is to promote and conduct domestic and international mediation as a means of settling disputes. The Board of Governors of the MMC, which is similar to the Board of Governors described in the arbitration section above, is responsible for the policy and general administration of the affairs and business of the MMC. The Board shall consist of not less than three and not more than five members and it shall consist of a chairman, a deputy chairman and members who have the knowledge and experience in dispute resolution, commercial matters or who are qualified to perform the duties of a member. Members of the Board hold office for a period of four years with the possibility of removal from office for any reason laid out in the Mediation Act such as if the member is legally incapacitated.

Legal representation of the MMC is vested in the registrar, who is the secretary of the Board or any other person authorised by the Board.

Mediation ends when the mediation parties execute a written agreement that fully resolves the dispute or when the mediator provides the mediation parties with a writing signed by the mediator stating that the mediation has terminated or if the parties elect not to continue with the mediation process. Records and all documentation relating to the mediation process must be retained by the mediator for a minimum of two years.

Malta sees the promotion of alternative dispute resolution as an invaluable tool for the proper functioning of effective dispute settlement, successful resolution processes and their development. However, notwithstanding the increasing awareness by corporate lawyers of principles of arbitration and mediation in drafting their dispute resolution clauses and the institutionalisation of certain mechanisms in a number of jurisdictions, there is no widespread agreement as to the shape which regulation of this field should take.

4.3 Admiralty And Ship Arrest In Malta

Malta's strategic location in the centre of the Mediterranean Sea makes it easily accessible from most European, Middle Eastern and North African ports, resulting in an abundant influx of maritime and aviation traffic.

Malta is a creditor friendly jurisdiction, well versed in maritime and aviation law matters. The mortgagee is offered a high level of protection, since mortgages are considered to be "executive titles" under Maltese law and are directly enforceable over the assets they secure.

Court proceedings are cost and time effective and creditors' rights in this respect are recognised and given priority.

4.3.1 Historical Context

The law on ship arrest in Malta was, until 2006, governed by outdated and unclear rules and the Maltese admiralty jurisdiction was still being regulated by the preceding Acts which can be traced back to the mid-19th century position in England. These provided very limited heads of jurisdiction "in rem" on the basis of which a ship could be arrested and, in particular, did not regulate the substance of the action in rem. Problems arose in relatively more recent cases connected with bareboat charterers, for which no provision had been made. Furthermore, there was no right of sister ship or of associated ship arrest, nor any provisions for Court approved private sale of ships.

All this changed with the statutory amendments introduced in 2006, as further amended in 2008, in an effort to reduce certain anomalies arising from the old legislation and to reflect current international practices and economic realities being faced by the shipping industry. Apart from extending and streamlining the list of maritime claims, the intention behind the new approach was directed towards addressing arrests of bareboat chartered vessels together with sister ship arrests which were previously unregulated.

4.3.2 Overview of the Maltese Scenario

Although Malta is not a signatory to the Arrest Conventions of 1952 and 1999, the list of maritime claims which can be found under the current Maltese legislation reflects the lists found under these two Conventions and also closely adheres to the British Supreme Court Act of 1981.

Ships are arrested in Malta by Warrant of Arrest issued on any one of the grounds listed in Article 742B of the Code of Organisation and Civil Procedure (COCP) giving rise to the *in rem* jurisdiction of the Maltese Courts. There are 25 maritime claims under section 742B of the COCP which include claims to possession/ ownership of a vessel, hypothecary/mortgage claims, claims for damage, loss of life, salvage, pilotage, crew wages and registry fees amongst others.

4.3.3 Advantages of Arresting a Vessel in Malta

- Maltese waters witness heavy maritime traffic throughout the year and this is one of the reasons why Malta is regarded as an attractive jurisdiction for arresting vessels within its 12 nautical mile territorial seas and internal waters.
- The Maltese jurisdiction is a very efficient legal centre.
- The arrest process in Malta is a fairly straightforward affair, provided that the client approaches the lawyer in a timely manner and supplies the required information and documentation upon request.

4.3.4 Methods of Arrest (*In rem – In personam*)

Maltese law provides both for the arrest of the vessel "in rem", that is against the vessel for any of the 25 reasons listed under article 742B of the COCP, as well as "in personam", meaning that the vessel is arrested not because of a claim 'personally' addressed against it, but it is arrested because of a claim addressed against the vessel's owner. This latter option can only be exercised where the Maltese Courts or a court of any other EU member state would have jurisdiction to deal with the matter at hand in accordance with Article 31 of Council Regulation (EC) No. 44/2001.

Ships may also be arrested in Malta in security of arbitration proceedings commenced against the shipowner. Lastly, ships may also be arrested in Malta pursuant to the provisions of Article 31 of Council Regulation (EC) No. 44/2001, dealing with provisional, including protective, measures, in cases where the Courts of another Member State have jurisdiction as to the substance of the matter.

In every case the court will issue a precautionary warrant of arrest against any vessel whose length exceeds ten metres, impeding it from leaving Maltese territorial waters.

The warrant is executed when notice is served on the executive officer of the authority who has the

sea vessel in its hands or under its power or control and a copy of the warrant of arrest is also served on the person whose ship or vessel is arrested, the master or other person in charge of such ship or vessel, or the agent of such ship or vessel. Furthermore, the authority which has in its hands or under its control the sea going vessel against which such warrant of arrest has been issued shall take all necessary measures to display the court order for the general attention of third parties.

4.3.5 Procedure

The claim against the vessel needs to exceed 7,000 and has to be a valid one, since any claimant who maliciously arrests a vessel shall be held liable and exposed to penalties in accordance with the law.

It is useful if the claimant has an indication of the vessel's itinerary and approaches the lawyer some time in advance (preferably when the vessel is heading towards Malta) in order for the lawyer to be able to make the necessary preparations for the arrest.

The claimant is usually requested to provide sufficient background relating to the facts of the case in order to establish whether there is a valid cause of action against the vessel, which could be substantiated by relevant documentation, such as unpaid invoices or similar documentary evidence. However, such documentation is not strictly required at this stage, since the warrant of arrest is used for precautionary measures.

Moreover, the client will need to provide an executed Power of Attorney. A scanned copy of this followed by the original usually suffices. Once this has been furnished, the arrest process can be finalised within 24 hours.

The owner of the arrested vessel has the right to request the Court to order that the claimant provides a counter-security to be deposited in Court in relation to the arrest. Since it is a means of safeguarding the owner's rights, such a request is usually accepted by Maltese Courts.

The claimant who successfully arrests a vessel has 20 days from the date of the issuance of the warrant to bring an action before a Court.

4.3.6 Sister Ship and Associated Ship Arrest

Maltese law also caters for sister ship arrests. In fact, in the maritime claims listed in Article 742B(d) – (y) of the COCP, an action *in rem* may be brought against:

- that ship, where the person who would be liable on the claim for an action *in personam* (the "Relevant Person") was, when the cause of action arose, an owner or charterer of, or in possession or in control of, the ship if at the time when the action in brought the Relevant Person is either an owner or beneficial owner of that ship or the bareboat charterer of it, and/or
- any other ship of which, at the time when the action is brought, the Relevant Person is the owner or beneficial owner as respects all shares in it.

In these cases, thus, sister ship and associated ship arrest is possible.

4.3.7 Releasing a Ship from Arrest

The procedure requires an application requesting the Court to release the ship from arrest which may be done by the person arresting the vessel or by the shipowner. A reason has to be given for liberating the vessel from arrest, such as payment of the claim, the deposit of the claim amount at the Court registry, or the setting up of sufficient security.

4.4 Judicial Sales By Auction

Malta has since time immemorial been an excellent jurisdiction to have vessels that are arrested in Maltese waters sold by public auction under court supervision as a means of enforcement by creditors of their executive titles.

The reputation that Malta enjoys in the sector has come about following the efficient manner of the Court Administration, the auctioneer and all involved parties in managing judicial sales by auction, and the relatively low costs to complete the procedure.

Typically, ships are sold within a few months from their arrest and related costs are normally hovering around 2% of the price that the vessel fetches in the judicial auction. GANADO Advocates has over the last 50 years or so been closely involved in many of the judicial sales of vessels carried out by the order of the Maltese courts.

Judicial sales by auction are held in public and any person may offer bids for the purchase of the vessel. The bids offered by participants are not sealed bids. The vessel is then sold to the highest bidder, free from encumbrances. There is no reserve price. The price is then either deposited in court or if the bid is offered *animo compensandi*, by a creditor of the ship, it is set off against the relative debt. The time-proven procedure works

well, is fair and transparent and is typically concluded within a few months, with the ship then leaving Malta in the hands of her new owners.

Apart from Malta's strategic geographical position in the centre of the Mediterranean, Malta also offers ship repair facilities which very often come in handy in cases of distressed ships, especially for buyers who do not want to cross oceans and incur additional expense to have the acquired vessel returned to "ship-shape" condition.

4.5 Court Approved Private Sales Of Ships, Vessels And Aircraft In Malta

This is a relatively recent addition to the Code of Civil Procedure which has been gaining momentum and interest since its inception in 2006.

It is a mechanism that combines the best elements of the private sale and the traditional judicial sale by auction. The Court is directly involved in approving a privately prearranged sale between the enforcing creditor having an executive title (mortgage) and the prospective buyer while the vessel is within Malta's jurisdiction.

The creditor retains full control of the Court proceedings and can see them concluded within a short time-frame.

The buyer is also protected as the vessel or aircraft are acquired free and unencumbered. Any unsatisfied claims against the secured asset after the conclusion of the sale can only be enforced against the proceeds.

Proceedings are swift and expedient, since the application is appointed for hearing within ten days of its filing and Court intervention is minimal.

The enforcing creditor may request the Court authorisation enabling the creditor to acquire the secured asset itself in set off of its debt over the said asset.

Mortgages burdening aircraft or vessels that are not registered in Malta may be enforced as long as the asset is within the jurisdiction of the Maltese Courts.

4.5.1 Procedure

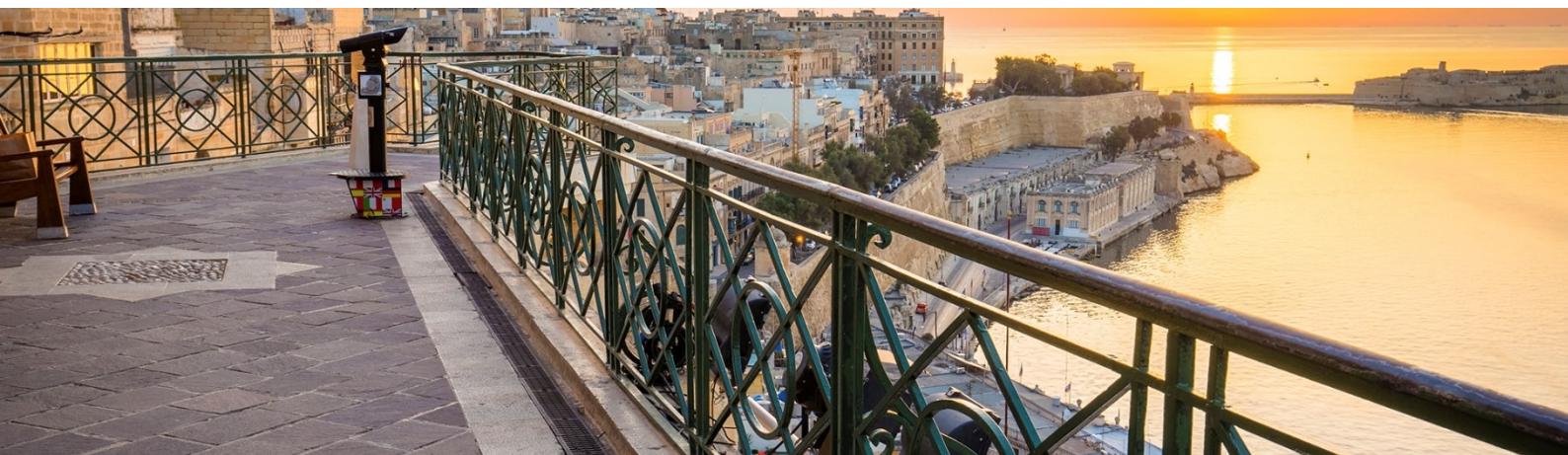
- The mortgagee with an executive title must file an application in Court requesting approval of the sale in favour of an identified buyer for a determined price.
- The application must be accompanied by appraisals from two independent reputable valuers, ensuring that the price reflects the true market value of the asset. This is aimed at protecting the interests of all the interested parties.
- The enforcing creditor needs to inform all interested parties about the Court proceedings in order for them to be given the opportunity to object to the sale if they have a valid reason to do so.
- The applicant must produce evidence that the private sale is in the interest of all known creditors and that price offered by the buyer is reasonable.
- The enforcing creditor enters into a memorandum of agreement with the prospective buyer for the sale of the asset.
- If the Court approves of the conditions of the sale, it goes on to nominate a person to execute the bill of sale on behalf of the asset-owner in order to transfer the vessel or aircraft, as the case may be, in accordance with the terms and conditions approved by the Court.
- The Court appointed person deposits the proceeds of the sale in Court to enable any creditor who has a right over the vessel or aircraft to advance that claim against such proceeds and not against the asset.

4.5.2 Advantages of the mechanism over the more traditional private sale and judicial sale by auction

- It offers a free and unencumbered title to the buyer unlike private sales, where registered mortgages, certain debts and encumbrances remain attached and follow the asset until discharged, repaid in full or time-barred.
- It ensures that the price the asset realised is close to the market value, which is not always possible in the judicial sale by auction, since the asset is ultimately purchased by the highest bidder.
- It is a faster mechanism than the judicial sale by auction.

There is less Court involvement than under the judicial sale, in which the Court oversees every step of the process until the sale by auction is completed.

GUIDE TO DOING BUSINESS
IN MALTA



CHAPTER 5: ENVIRONMENTAL POLICY

Up to April 2016, the main source of environmental law in Malta was the Environment and Development Planning Act, Chapter 504 of the Laws of Malta ('EDPA') making it the duty of the Government of Malta and every person to protect the environment (Article 3, EDPA). Article 6 of the EDPA established the Malta Environment and Planning Authority ('MEPA'). MEPA was, at the time, the authority responsible for spatial planning and environmental protection.

In 2016, new law was enacted that effectively replaced the EDPA. Three (3) Acts of Parliament have been passed, namely:

- The Development Planning Act, 2016 ('New Planning Act')(Chapter 552 of the Laws of Malta);
- The Environment Protection Act, 2016 ("New Environment Protection Act") (Chapter 549 of the Laws of Malta); and
- The Environment and Planning Review Tribunal Act, 2016 ("New Review Tribunal Act") (Chapter 551 of the Laws of Malta).

Insofar as environmental law is concerned, the new law did not bring major changes to the applicable substantive law that continues to be regulated by the various subsidiary regulations that were previously promulgated under the EDPA. Essentially, the new law provides for a 'demerger' of MEPA such that the 'planning regime' is now administered by a new Planning Authority (the "PA") with responsibility for building and sanitary matters, while environmental protection is now assigned to a newly established autonomous entity, namely, the Environment and Resources Authority (the "ERA"). Consequently the New Planning Act is concerned solely with land use while the New Environment Protection Act deals primarily with the management of the environment and natural resources.

Furthermore, following Malta's accession to the EU in 2004, Malta has transposed EU environmental legislation within the Maltese legal framework.

approved by Parliament in July 2015 and which is the official recognised document which addresses the spatial issues for the Maltese Islands in the coming years and is based on an integrated planning system regulating the sustainable use and management of land and sea resources.

This marks a shift in the way strategic planning is carried out in the Maltese Islands from traditional land use planning to a more holistic spatial planning approach. The Plan provides a strategic spatial policy framework for both the environment and development up to 2020, complementing the Government's social, economic and environmental objectives direction for the same period.

The basic objective of environmental and planning law in Malta is that of optimising the physical use and development of land which respects the environment whilst ensuring that the basic social needs of the community are, as far as is practical, satisfied.

5.1 Agencies Administering and Enforcing Environmental Law

The responsibilities previously undertaken by MEPA were as from 4 April 2016 assumed by two distinct authorities, namely the PA and the ERA, both functioning independently from each other.

The New Review Tribunal Act also provides for the setting up of an Environment and Planning Review Tribunal with a mandate to hear and determine appeals from decisions taken by either of the two authorities. Other entities that have emerged as a result of the recent demerger of MEPA are the Regulator for Energy and Water Services (the "REWS") which partially took over the functions of the Malta Resources Authority (the "MRA") and the Energy and Water Agency, which is a Government Agency established via Legal Notice 340/2016 within the Ministry for Energy and Water Management. The Energy and Water Agency is tasked with formulating and implementing Government's national policies in the energy and water sectors, aimed at ensuring security, sustainability and affordability of energy and water in Malta.

The planning and environmental duties of the Government of Malta previously provided for in the EDPA have been generally mirrored in the new legislation. Like the EDPA, the New Environment Protection Act states that it is the duty of everyone together with the Government to protect the environment and to assist in the taking of preventive and remedial measures to protect the environment and manage natural resources in a sustainable manner. The New Environment Protection Act also enshrines the principle that it is the Government's duty to protect the environment for the benefit of present and future generations.

The ERA is a statutory authority, independent of the Government. It is active in matters concerning the protection of the environment and as such has the leading role in this field. Invariably, enforcement of environmental law is principally carried out by the ERA through the hand of its enforcement officers. The stated mission of the ERA is "to safeguard the environment for a sustainable quality of life". Various aspects of environmental law enforcement, however, fall (occasionally, jointly with the ERA) within the portfolio of other State entities, such as the Authority for Transport in Malta, the Executive Police and the local wardens.

The Malta Resources Authority is a public corporate body set up in 2000 through the Malta Resources Act (Chapter 423 of the Laws of Malta), this authority was entrusted with the functions to to regulate water, energy and mineral resources, to promote energy efficiency and renewable energy, and with responsibilities in oil exploration and climate change. The Regulator for Energy and Water Services Act (Chapter 545 of the Laws of Malta) changed the Malta Resources Authority's responsibilities mainly to registration and metering of boreholes, mineral resource regulation and climate change reporting and operation of the emission trading scheme.

The Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta) is also relevant as it is the basis on which, inter alia, registration, evaluation, authorisation and restriction of chemicals (on the basis of the REACH Regulation EC 1907/2006) and pesticide control (in terms of the Pesticides Act (Chapter 430 of the Laws of Malta)) is administered in Malta through the Technical Regulations Division of the Malta Competition and Consumer Affairs Authority ("MCCAA"). Other relevant bodies within the context of Maltese environmental law and policy include the Ministry for Sustainable Development, the Environment and Climate Change ("the Ministry"), which is responsible for, inter alia, sustainable development, climate change policy, environmental policy, waste management strategy, national parks, afforestation and the countryside, rural development, agriculture and horticulture, fisheries and acqua culture, amongst other things.

The Authority for Transport in Malta seeks to promote and develop the transport sector in Malta by means of proper regulation and by the promotion and development of related services, businesses and other interests both locally and internationally. The Authority for Transport in Malta Act (Chapter 499 of the Laws of Malta), which came into force on 1 January 2010, divides the Authority into various "directorates". The Ports and Yachting Directorate is responsible inter alia for the prevention and control of marine pollution.

There are other bodies with specific tasks such as the Parks, Afforestation and Rural Conservation Department ("PARK"). It is responsible for afforestation and the management of various afforestation and recreational sites in Malta. The Department runs the 34U Campaign (tree adoption scheme), educational programmes and organises tree planting activities for the promotion of public awareness on the importance of indigenous trees and flora.

The Strategic Environmental Assessment ("SEA") Focal Point oversees the implementation of the new Strategic Environmental Assessment Regulations (Subsidiary Legislation 549.61), which implement the EU Directive 2001/42/EC of the European Parliament and of the Council on the Assessment of the Effects of certain Plans and Programmes on the Environment. The purpose of these regulations is to keep all interested parties up to date with the progress registered on plans and programmes which have been referred to the SEA Focal Point and for which a decision as to whether a SEA is required or not has been taken.

WasteServe Malta Ltd is responsible for providing waste management infrastructure, which it administers at a national level.

5.2 Approach Towards Enforcement of Environmental Law

Within the last decade, Malta has seen a notable increase in enforcement. In recent years, progress has been achieved and enforcement has indeed been strengthened. The authorities and the ministry responsible for environment frequently organise campaigns intended to disseminate information that demonstrates the benefits of environmental protection and serves to sensitise the population to various environmental issues.

The general rule is that a person who carries out an activity, of whatever nature, for which a licence is required or acts in breach of any condition attached to such a licence, will be guilty of a criminal offence.

In some cases, sanctions can be light (such as warnings to the operators) but in other cases, sanctions can be substantial (such as the imposition of hefty fines). In those cases where the environmental wrongdoing amounts to a criminal offence, imprisonment or revocation of licences or permits (or both) are envisaged in the law.

The ERA, as the primary environmental authority, enjoys enforcement powers against offenders – officers from the ERA are empowered to enter upon any land and inspect, survey or verify whether illegal activity is taking or has taken place. The ERA may request the assistance of the police force, any local council, any department of the Government or any agency of the Government.

5.3 Provision of Environment-Related Information to Interested Persons

On the 23 April 2002, Malta ratified the UNECE Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters. Following accession to the EU, Malta transposed Directive 2003/4/EC of the European Parliament and the Council on public access to environmental information via the Freedom of Access to Information on the Environment Regulations (Subsidiary Legislation 549.39) (the "Information Regulations"). The Information Regulations grant the right of access to environmental information held by or for public authorities. Moreover, the Information Regulations also ensure that environmental information is progressively made available and disseminated to the public in order to achieve the widest possible systematic availability and dissemination.

The authorities may refuse to provide the requested environmental information if the request is: unreasonable; too general; concerns internal communications or concerns material in the course of completion; or unfinished documents or data. The authorities may also refuse to provide environmental information if disclosure of the information would adversely affect confidentiality; international relations, public security or national defence; the course of justice; or intellectual property rights.

The authorities may also refuse to provide environmental information if disclosure thereof would adversely affect the interests or protection of any person who supplied the information requested on a voluntary basis without being under, or capable of being put under, a legal obligation to do so, unless that person has consented to the release of the information concerned; or to protect the environment to which such information relates, such as the location of rare species.

As part of its commitment towards regular publication of environmental information in a form that is easily accessible and user-friendly, MEPA (ERA's predecessor) published regular 'state of the environment' reports (which are also available online), fulfilling its obligation under Maltese law requiring it to publish a 'state of the environment' report every four years. ERA will continue in MEPA's footsteps.

Interestingly, legislation is now moving away from the right to obtain information towards the right to be informed. Recent legislation imposes an obligation on the environmental authorities to ensure that the public is given early and effective opportunities to participate in the preparation and modification or review of certain plans or programmes that have environmental repercussions.

5.4 The Acquisition and Transfer of Environmental Permits

The ERA regulates the environmental impact of enterprises through two key mechanisms. Smaller scale activities are regulated through a set of General Binding Rules ("GBRs") which apply to all enterprises within a common group (e.g. Hotels and Restaurant Group). Larger scale activities are regulated through an Environmental Permit issued on an individual basis by the ERA. Certain enterprises of limited environmental significance (e.g. insurance companies) are exempt from control through a GBR or permit.

Whereas environmental permits are intended to regulate generally medium to large scale enterprises or smaller enterprises with significant environmental risk, GBRs are intended to regulate small and micro-scale enterprises through a standard set of environmental conditions related to waste management, emissions to atmosphere, effluent discharges and storage of materials and chemicals.

There are various instances where certain legislation provides for specific permits. For example, industrial activities and installations of a

certain entity or impact would require a permit from PA in line with the Industrial Emissions (Integrated Pollution Prevention and Control) Regulations (Subsidiary Legislation 549.77).

Management of waste, particularly hazardous waste, will also require a specific permit as required by the Waste Regulations (Subsidiary Legislation 549.63). Discharge of trade effluent into the public sewage system will likewise require a licence in accordance with the Sewage Discharge Control Regulations (Subsidiary Legislation 545.08.). Environmental permits are also required for volatile organic compounds as may be required by the Industrial Emissions (Limitation of Emissions of Volatile Organic Compounds) Regulations (Subsidiary Legislation 549.79). Permits are required in case of discharges into or extracting of the groundwater. When granting licences, the governmental authorities may impose conditions and must give reasons if a request for a licence is refused or if particular conditions are imposed. In addition to the above, producers of certain waste streams have certain responsibilities in line with EU Law.

Malta is a party to the "Convention on International Trade on Endangered Species of Wild Flora and Fauna" ("CITES"), and regulates international exports and imports of specimens of species of live and dead animals and plants and their parts and derivatives. This is based on a system of permits and certificates that can be issued if the requirements needed are met.

Land and property development, including change of use, likewise requires development permission from PA.

As a general rule, in cases of land and property development, permits or licences attach to the particular development being licensed and may, in most cases, be transferred from one person to another provided that the licensed development remains the same. However, there are a substantial number of exceptions to this general rule.

5.5 Right of Appeal from Refusal to Grant Environmental Permit or from Conditions Included in Permit

Generally, appeals from such decisions are permitted. For example, in the case of development permits concerning land or property, if an applicant considers that the conditions imposed upon development permission, or the refusal of such permission, are unreasonable, he may appeal with the Environment and Planning Review Tribunal. A further and final appeal, restricted to points of law, may be lodged with the Court of Appeal. Appeals from refusals of (or from the imposition of conditions on) environment protection-related or other such permits emulate, more often than not, the same structure as for development permit appeals.

5.6 Environmental Audits or Environmental Impact Assessments for Particularly Polluting Industries and other Installations/Projects

Certain developments, because of their nature, extent and location or on account of other environmental considerations, will require an Environmental Impact Assessment ("EIA") before a decision on development permission is taken. Projects that may qualify for an EIA include infrastructure projects, land use and built development projects, development on the coast, extractive industry, livestock, energy industry, industrial developments and operations. The categories of projects that require an EIA are outlined in the Environmental Impact Assessment Regulations (Subsidiary Legislation 549.46).

The EIA is a systematic process that identifies, assesses and predicts the likely significant environmental impacts of a proposed development or action. It is a tool to achieve environmentally sound and sustainable development proposals and activities and can be utilized as a decision-making tool highlighting the likely significant effects of certain proposals on the environment.

Since 30 December 2005, a further level of assessment has been introduced. Governmental plans and programmes that are "likely to have a significant effect on the environment" are subject to a "strategic environmental assessment" ("SEA" as defined above).

The Strategic Environmental Assessment Regulations (Subsidiary Legislation 549.61), provide for the protection of, primarily, but not exclusively, the environment. The protection is afforded at planning stage. These regulations strive to promote the integration of environment and health considerations into the preparation of plans and programmes, with a view to promoting sustainable development by ensuring that a strategic environmental assessment is carried out on plans and programmes which are likely to have a significant effect on the environment. The SEA Focal Point within the Ministry for Sustainable Development, the Environment and Climate

Change was specifically set up to carry out such a task.

5.7 Emissions Trading and Climate Change

Following Malta's accession to the EU in May 2004, Malta implemented the EU environmental acquis that directly or indirectly led to the reduction of greenhouse gases. The main legislation and decisions on reduction of emission include:

- Subsidiary Legislation 423.50, the European Union Greenhouse Gas Emissions Trading Scheme for Stationary Installations Regulations. This subsidiary legislation transposes the cornerstone of the EU's ambition to reduce greenhouse gas emissions namely the 'cap-and-trade' approach which gives companies the flexibility they need to cut their emissions in the most cost-effective way. Land based installations that fall within the scope of this legislation are subject to permitting;
- In addition to the EU emissions trading scheme, Malta is also subject to a quantified emissions limitation target of non-ETS emissions. The Maltese 2020 target is a limitation to emission growth of +5% when compared to 2005;
- The Promotion of Energy from Renewable Sources Regulations (Subsidiary Legislation 545.11) implement Directive 2009/28/EC of the European Parliament and of the Council of 23 April 2009 on the Promotion of the Use of Energy from Renewable Sources amending and subsequently repealing Directives 2001/77/EC and 2003/30/EC, and seek to promote the use of renewable energy by setting a 10% target by 2020 for the share of energy from renewable sources and a separate target of 10% renewable energy penetration in road transport by 2020.

Malta was instrumental in launching and piloting the concept of climate change through various international fora. Particularly, on the 22 August 1988, Malta requested the inclusion of an item entitled 'Declaration Proclaiming Climate as part of the Common Heritage of Mankind', in the provisional agenda of the 43rd session of the United Nations ("UN") General Assembly, urging the protection of global climate for present and future generations of mankind.

On 21 September 1988, the General Committee of the General Assembly included an item entitled 'Conservation of Climate as part of the Common Heritage of Mankind' and allocated the item for consideration in the Second Committee. On 24 October 1988, Malta formally introduced the item at a meeting of the Plenary Session of the UN General Assembly. During the session, Malta's policy was explained in the sense that there should be global recognition of the fundamental right of every human being to enjoy the climate in a state that best sustains life. Malta then presented a concrete proposal in the form of a draft resolution that was submitted for consideration in the Second Committee. Resolution 43/53 was unanimously adopted in the plenary meeting of the General Assembly on 6 December 1988.

This resolution paved the way for a series of events that led to the formulation of the United Nations Framework Convention on Climate Change ("UNFCCC"). On 9 May 1992, the world's governments adopted the UNFCCC at the Earth Summit in Rio de Janeiro. Malta ratified UNFCCC in March 1994 as a non-annex I state and, on 11 November 2001, went on to ratify the 1997 landmark Protocol to the UNFCCC (the Kyoto Protocol). The UNFCCC and its protocol reflect Malta's policy on climate change. Malta also ratified the second commitment period to the Kyoto Protocol and on 2 October 2016 Malta ratified the Paris Agreement.

Domestically, Malta continued developing its policy on climate change with its submission in April 2014 of the third, fourth, fifth and sixth Communication to the UNFCCC. The action plan puts forward various measures that ought to be adopted in support of greenhouse gas mitigation and, furthermore, embraces measures that must be taken to allow the Maltese islands to adapt to climate change.

In June 2008, the Climate Change Committee was set up by the Government to address climate change, tap into sources of alternative energy and ensure that Malta's national obligations to reduce carbon dioxide emissions are adhered to in order to attain emission targets as agreed between Malta and the EU. In September 2009, the Government of Malta issued a Report entitled 'National Strategy for Policy and Abatement measures relating to the reduction of Greenhouse Gas Emissions', consolidating the work carried out by the Climate Change Committee. This strategy seeks to articulate the action to be adopted by Malta in the years to come. Malta is obliged to reduce CO2 emissions by 10% and ensure that at least 10% of energy is generated from alternative sources by 2020.

The National Climate Change Adaptation Strategy (the "Strategy") was published and adopted by the

Government of Malta in 2012. It aims to build upon the National Strategy for Policy and Abatement Measures Relating to the Reduction of Greenhouse Gas Emissions of 2009 in terms of governance and policy infrastructure. The Strategy seeks to identify recommendations in various sectors which are vulnerable to climate change whilst addressing financial impacts and sustainability issues. The Strategy identifies the principal strategic climate impacts likely to affect Malta and highlights specific issues for improvements.

Malta has adopted the Climate Action Act (Chapter 543 of the Laws of Malta) (the "Act") which aims to streamline Malta's commitments on climate change on both main fronts of climate action, namely mitigation and adaption in a legally binding way. This Act aims to instill ownership across the board to fine tune effective climate action and governance. Specifically, on adaptation, the Act dictates the process to conduct periodic reviews on this adaptation. It also foresees the inclusion of information on climate change's actual and projected impacts.

5.8 Recycling of Rigs

Malta, a major player in the shipping industry, continues to augment and to strengthen its maritime services. Over the past years, Malta has seen a noticeable increase in rigs anchoring in Maltese waters. Rig operators exploit the geographical location of the Maltese Islands at the centre of the Mediterranean as a base for the transboundary movement of rigs which, being intended for breakage and disposal, transmute into 'hazardous waste', utilizing the Islands' well established, industry-savvy service providers. The rigs are shipped to Malta to be cold stacked and, unless the rigs are subsequently deployed or sold, they are shipped as 'waste' for recycling. If the rigs are intended for disposal, both Malta and the EU are parties to the major international convention on transboundary movement of waste and this ensures that the rigs are disposed of and/or recycled in an environmentally responsible manner.

Owing to Malta's position in the Mediterranean, Malta's ratification of all the important environmental conventions and the efficient administration in place locally, the country has seen an increasing interest from industry stakeholders to act as an intermediary in the recycling process of rigs. Entrepreneurs seeking to use Malta for this purpose can therefore rely on Malta's experience and well established procedure on the transboundary movement of hazardous waste and the recycling thereof. GANADO Advocates has been at the forefront of this significant development in this dynamic and ever-changing sector.

CHAPTER 6: INTELLECTUAL PROPERTY

The exponential growth in the field of intellectual property has been remarkable, with companies becoming increasingly aware of the value of their Intellectual Property Rights. Our Firm has been at the forefront of this dynamic sector and continues to expand its practice and develop expertise to assist both local and international clients with their intellectual property needs, be it by registering intellectual property rights, protecting these rights through non-disclosure and confidentiality agreements, enforcing them through litigation and ADR procedures, and regulating the licensing and monetisation of these rights through appropriate agreements and procedures.

Malta's membership in the EU means that it is compliant with European standards of protection and complies with international treaties and harmonisation measures to ensure that it offers the most advantageous position to prospective Intellectual Property Rights holders.

Intellectual Property Rights are at the heart of today's knowledge-based economy which has given rise to a number of growing industries, including media and ICT. The provision of communication services as well as online services have revolutionised business models and in many cases, technology has outpaced legal developments. Our team is committed to keeping abreast of new developments and has been involved in a number of legislative initiatives to ensure that Malta remains on the cutting-edge of these constantly evolving legal fields.

Our Firm has also spearheaded an initiative to ensure that Malta offers the best possible solutions to players in the Intellectual Property space. This is currently being reviewed by a steering committee tasked with implementing those proposals and recommendations that are deemed to increase the jurisdiction's attractiveness. These recommendations focus on ensuring that Malta offers a robust system of protection for Intellectual Property Rights but also allows for the exploitation and commercialisation of these rights at various levels and to the fullest extent possible. This could potentially tap into previously unexplored avenues of finance for businesses as the value of Intellectual Property Rights is recognised and utilised to spur growth and investment.

6.1 Trademarks

6.1.1 National Trademark Registration

Our Firm is active in the registration of trademarks in the national trademark register as well as the registration of trademarks in the European Union trademark register ("EUTMs").

The enactment of the Trademarks Act (Chapter 416 of the Laws of Malta, the "Trademarks Act") and its promulgation on the 1st January 2001 satisfied a long-awaited need for a radical overhaul of the trademark law and practice in Malta. The Trademarks Act harmonised domestic trademark law with the Trade Mark Directive (Directive 89/104/EEC to approximate the laws of the Member States relating to trade marks) and achieved conformity with EU trademark norms. The Trademarks Act is also compliant with the Agreement on Trade Related Aspects of Intellectual Property Rights ("TRIPS").

The promulgation of Council Regulation (EC) no 207/2009 on the EU trade mark has harmonised trademark protection throughout EU Member States. It is now possible for trademark protection to be obtained throughout the European Union.

Trademarks may be registered in the Malta national register of trademarks in respect of goods or classes of goods and also services. The Trademarks Act also envisages the registration of collective marks and guarantee or certification marks. It defines a "trademark" as "a sign capable of being represented graphically which is capable of distinguishing goods or services of one undertaking from those of other undertakings" and lists (by way of elucidation only and non-exhaustively) particular examples of what may constitute a trademark, namely words, personal names, letters, numerals, the shape of goods or their packaging, as well as

the "figurative element" (such as stylistic devices, labels and logos).

All signs capable of graphic representation and distinguishing the goods or services of one undertaking from another are inherently registrable, unless excluded by the absolute and/or the relative grounds for refusal listed in the law. The Trademarks Act simplified the registration process and effectively created a presumption of registrability in favour of the applicant.

The following are some (not all) of the absolute grounds for the Industrial Property Registrations Directorate (the "IPRD") refusing to register a mark:

- a sign which is devoid of any distinctive character;
- a trademark exclusively consisting of a sign ordinarily used in trade to designate quality, purpose, geographical origin, value etc.;
- a trademark exclusively consisting of a sign which has become customary in current language or bona fide and established trade practice, namely a generic mark;
- a sign consisting exclusively of a shape resulting from the nature of the goods themselves or necessary to obtain a technical result or giving substantial value to goods;
- a trademark contrary to public policy or morality;
- the application for registration of the trademark is made in bad faith; or
- the mark will deceive or is likely to deceive the general public as to the nature, quality or geographical origin of the goods or services.

Relative grounds of refusal may subsist by virtue of a trademark's similarity to a pre-existing registered mark which is registered for use in relation to goods and services which are similar. If the pre-existing trademark is similar but registered for different classes of goods and services, the trademark will not be registered if, or to the extent that, the earlier trademark has a reputation in Malta and the use of the later mark would take unfair advantage of the repute of the pre-existing trademark.

It should be noted that under the Commercial Code (Chapter 13 of the Laws of Malta), marks used for commercial and trading purposes are still granted legal protection. However, in cases where the ownership of the mark is in dispute, the existence of proof of registration of a trademark is pivotal. Opposition proceedings are not possible under Maltese law. It is only possible to file an application for the removal of a trademark that has already been registered or, in the alternative, request the issuance of a warrant of prohibitory injunction against the IPRD to inhibit the registration of a trademark.

Sounds are registrable insofar as they are capable of graphic notation. This would include music, and to the extent that they may be rendered graphically, also non-musical sounds. Colours and combinations of colours constitute registrable trademarks insofar as distinctively reproduced. Scents, too, are susceptible of registration if graphic notation is possible. Shapes (or three-dimensional marks) may also be registered as long as the shape is non-functional. Clearly, the gradual development of trademark practice in this area will determine the actual extent and scope of the wide latitude granted by the Trademarks Act for registration.

It is not possible under our law to file a multi-class application. A separate application for each class is needed.

6.1.2 Trademark Registration Procedure

The following information and documentation would be required at the moment of filing the relative application for registration of (i) a trade mark within the Malta national register of trademarks; or (ii) an EUTM; or (iii) a trademark through the Madrid Protocol with the European Union Intellectual Property Office ("EUIPO") as office of origin:

- a duly executed original power of attorney duly witnessed where the witness will confirm the signatory's identity and signature and (in the case of a body corporate) the signatory's authority to act for and bind the body corporate with his signature;
- full name and address of applicant, i.e. the proprietor of the mark;
- clear representation(s) of the trademark (word or logo);
- the nature of the mark, i.e. if the mark is not a word or a picture;
- the relative International Classification number or a precise description of the goods or services in respect of which registration is sought; the IPRD adopts for trademark registration purposes the International Classification of Goods and Services under the Nice Agreement, as administered by WIPO;
- an indication whether the application is being made in respect of a trademark, a collective mark or a certification mark or three-

dimensional mark (regulations for collective and certification marks must be filed within 9 months of the application);

- if colour is a distinctive feature of the mark to be claimed, the colour claimed must be stated (preferably by reference to its Pantone colour reference number);
- if it is intended to disclaim the right to the exclusive use of the mark or to limit its use, the disclaimer or limitation must be stated;
- if priority under the Paris Convention is to be claimed in the application, the priority, country and number should be indicated;
- in the case of a device or logo a short description of the mark; and
- in the case of an application through the Madrid Protocol, the address where the applicant has a real and effective industrial or commercial establishment in the territory of the Contracting Party.

For the purposes of registration of a trade mark in Malta, if it appears to the IPRD that the requirements for registration have been met, the application is accepted as eligible for registration. The registration is then published and a Certificate of Registration issued. Trademarks are registered for a period of 10 years and are renewable for further 10 year periods. Third parties may apply to the courts on any of the grounds stipulated in the law for a declaration of invalidity of a registered trademark or for its revocation (such as, for non-use in Malta or misleading the public). The Trademarks Act has strengthened protective remedies by clarifying the acts constituting infringement.

Application fees are payable in advance. The principal cost items (Governmental fees) at the time of writing of this publication are:

Registration	116.47
Assignment	58.23
Renewal	93.17

A full list of the applicable fees is listed in the Schedule of Fees of the Trademarks (Provisions and Fees) Rules, Subsidiary Legislation 416.01 of the Laws of Malta.

In the case of EUTM registrations, the applications are reviewed and processed by EUIPO. It should be noted that when filing an application with the EUIPO it is possible for opposition proceedings to be instituted by any third party. There is an opposition period of three months following the publication of the EUTM, whereby oppositions may be filed by any interested person.

The EUIPO shall examine the opposition application and if it finds that the trademark may not be registered in respect of some or all of the goods or services for which the EUTM application has been made, the application shall be refused in respect of those particular goods or services.

6.1.3 Use of a Registered Trademark

A trademark proprietor would be well advised to note that a trademark application will contain a declaration that the trademark is being used by the applicant, or by another party with his consent, in relation to the goods or services stated in the application or there is bona fide intention that it be so used. Furthermore, under our law, non-use of a registered trademark may have certain legal consequences which could be prejudicial to the trademark proprietor's rights. Essentially a registered trademark not put into commercial use within 5 years of registration may become the subject of a revocation request made upon the action of a third party.

It is possible to claim priority under our law. Malta is a party to the Paris Convention (though reservations have been made in respect of several provisions thereof). The priority period is of 6 months. The proprietor is entitled to register his trademark under our law in priority to other applicants, provided that such application is made within 6 months from the date of the application in that country. Claiming priority does not involve additional costs. A priority application is made in the same manner as an ordinary application, but a copy of the application issued by the trademark office of that country (showing the relative application date and number) must be attached to the Maltese application. In terms of TRIPS and the Paris Convention, the term of priority is calculated by the IPRD in the case of trademarks from the date of filing of an application for registration at the IPRD. This policy applies in respect of trademarks which are still due for their first renewal.

As Malta is a member of the EU, trademarks registered with the EUIPO are now automatically protected in this jurisdiction.

Moreover, under the EUTM Regulation it is also possible for a person who has filed an application for a trademark in Malta to enjoy, for the purpose of filing an EUTM application for the same trademark in respect of goods and services which are identical with that contained in the national application, a right of priority during a period of six months from the date of filing of the first application. In order to file a priority claim, a copy of the document

certified by the IPRD or an extract from the official register is sufficient.

6.1.4 Rights Conferred by a Registered Trademark

A registered trademark is a property right obtained by the registration of the trademark under the Trademarks Act. The proprietor of a registered trademark has the rights and remedies provided by the Trademarks Act. The primary right conferred by a registered trademark is that of exclusivity.

This right of exclusive use is infringed if the trademark is used in Malta without the consent of the proprietor. The acts constituting an infringement of a registered trademark under the Trademarks Act closely mirror the statutory grounds for refusing a trademark registration (Section 6.1.1 above). Thus, a trademark proprietor's rights are infringed if that proprietor's trademark is used in Malta without that proprietor's consent specifically if a person uses in the course of trade:

- a sign which is identical with the trademark in relation to goods or services which are identical with those for which it is registered; or
- a sign where, because the sign is identical with the trademark and is used in relation to goods or services similar to those for which the trademark is registered, there exists a likelihood of confusion on the part of the public, including the likelihood of association, with the trademark (but mere association by the public without likelihood of confusion will not alone be considered as constituting an infringement); or
- a sign where, because the sign is similar with the trademark and is used in relation to goods or services similar to those for which the trademark is registered, there exists a likelihood of confusion on the part of the public, including the likelihood of association, with the trademark (but mere association by the public without likelihood of confusion will not alone be considered as constituting an infringement); or
- a sign where, because the sign is similar with the trademark and is used in relation to goods or services identical with those for which the trademark is registered, there exists a likelihood of confusion on the part of the public, including the likelihood of association, with the trademark (but mere association by the public without likelihood of confusion will not alone be considered as constituting an infringement); or
- a sign which is identical with or similar to the trademark, and such sign is used in relation to goods or services which are not similar to those for which the trademark is registered, where the trademark has a reputation in Malta and the use of the sign, being without due cause, takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the trademark.

The trademark proprietor also has the right to licence rights in the trademark and may register the licence with the IPRD. The licence granted may be general or limited, exclusive or non-exclusive in nature. In the case of an exclusive licensee, their rights and remedies are the same as those of the proprietor of the registered trademark and such a licensee may therefore institute proceedings for proceedings in the same way as the trademark proprietor.

The granting of licences as well as assignments and transfers of trademarks are considered to be registrable transactions for the purposes of the Trademark Act, therefore the particulars of these transactions may be registered. There is no positive obligation to register such rights in order for them to be legally constituted. However, until an application for registration has been made, such a transaction is ineffective against a third party acquiring in good faith a conflicting interest in the trademark and a person claiming to be a licensee. Therefore, it is imperative that any interest in a trademark is duly registered.

6.1.5 Assignment of a Registered Trademark

An assignment of a registered trademark may likewise be partial and limited (so as to apply to some but not all the goods or services in respect of which it is registered or to the use of the trademark in a particular manner or locality) and/or either in connection with the goodwill of a business or independently of it. It is therefore important to draft the deed of assignment in such a way as to determine what exactly is being assigned.

6.1.6 Trademark Infringements and Remedies

A trademark is infringed whenever an identical or similar mark is used. For the purposes of the Trademarks Act a person "uses" a sign if he:

(i) affixes it to the goods or packaging thereof;

(ii) offers or exposes goods for sale, puts them on the market or stocks them for those

purposes under the sign, or offers or supplies services under the sign;

(iii) imports or exports goods under the sign; or

(iv) uses the sign on business papers or in advertising.

In addition, a person who applies a registered trademark to material intended to be used for labelling or packaging goods, as a business paper, or for advertising goods or services, shall be treated as a party to any use of the material which infringes the trademark. This is only applicable if, when such person applied the trademark, he knew or had reason to believe that the application of the mark was not duly authorised by the trademark proprietor or the licensee.

Should any person make use of the trademark as described above, the Trademarks Act makes provision for the institution of trademark infringement proceedings.

These proceedings are initiated by means of a sworn application filed in the First Hall Civil Court. The court is empowered to grant various remedies in cases where it finds infringement has occurred. It may order the infringing person:

(i) to cause the offending sign to be erased, removed or obliterated from any infringing goods, material or articles in his possession, custody or control;

(ii) secure the destruction of the infringing goods, materials or articles in question where the remedy listed in (i) above is not reasonably practicable;

(iii) (to deliver to the proprietor of the trademark or such other person as the Court may direct, the infringing goods, materials or articles. The proprietor may only request the Court to issue such an order within a period of six years from when the trademark was applied to goods or their packaging or to the material or when the infringing articles were made.

If the Court grants an order pursuant to point (iii) above, any interested party may then bring another action for the Court to order the destruction of the goods or their forfeiture.

6.1.7 Trademark Searches

Searches may be conducted in the national register of trademarks at the IPRD by means of an online search system. Official trademark search certificates are also issued by the IPRD at a fee.

6.2 Copyright and Neighbouring Rights

6.2.1 Copyright

The Copyright Act, (Chapter 415 of the Laws of Malta, herein the "Copyright Act") regulates copyright protection in Malta. It was part of a radical overhaul of intellectual property legislation in the country, enabling Malta to conform to international conventions such as the Berne Convention for the Protection of Literary and Artistic Works and the TRIPS Agreement as well as EU Directives.

By virtue of the Copyright Act, the works that are eligible for copyright protection in Malta are:

- Artistic Works
- Audiovisual works;
- Databases;
- Literary works; and
- Musical works.

The exclusive rights which are regulated and restricted by copyright are:

direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part;

(i) rental and lending;

(ii) distribution;

(iii) translation in other languages, including different computer languages;

(iv) adaptation, arrangement and any other alteration and reproduction, distribution, communication, display or performance to the public of the results thereof;

(v) broadcasting or re-broadcasting or the communication to the public or cable retransmission;

(vi) display or performance to the public.

Moral rights will also attach to the author of copyrighted material. These rights solely appertain to the author of the copyrighted material and thus if the article entitled to copyright protection is licensed out, these moral rights will not form part of the patrimony of the licensee

No formalities are required to entitle a work to copyright protection but for a literary, musical or artistic work to be eligible for copyright, the work must have an original character and it must have been fixed or otherwise reduced to material form.

However there are certain exemptions whereby copyright is not deemed to have been infringed. These exemptions are primarily restricted to temporary reproductions which are transient; for non-commercial or non-profit use; for certain purposes such as public libraries, educational establishments and museums and scientific research; caricature and pastiche.

Databases are not eligible for copyright protection unless by reason of the selection or arrangement of its contents, they constitute the author's intellectual creation. Moreover, copyright conferred upon a database does not extend to its content, without prejudice to any right subsisting in such content. Furthermore, copyright protection shall not extend to ideas, procedures, methods of operations or mathematical concepts as such.

Generally, copyright protection is afforded for the duration of 70 years commencing after the end of the year in which the author dies, irrespective of the date when the work is lawfully made available to the public.

6.2.2 Neighbouring Rights or Related Rights

Neighbouring rights or related rights are the rights that belong to performers, the producers of sound recordings and broadcasters in relation to their performances, phonograms and broadcasts respectively. These rights differ from copyright in that they belong to persons regarded as intermediaries in the production, recording or diffusion of works.

The related rights protected by the Copyright Act are the following:

- Performers' rights which are protected for a period of 50 years commencing from the end of the year in which the fixation of the performance was first lawfully published or first lawfully communicated to the public, whichever is the earlier, or in the absence of such publication or communication, from the end of the year in which it was first performed. The exclusive rights protected are the fixation, reproduction, rental and lending, distribution, making available to the public, broadcasting and communication to the public;

  Apart from these rights, performers are also entitled to moral rights which are non-transferable to a licensee.

- Producer's rights in sound recordings and audio-visual works which are protected for a period of 50 years commencing from the end of the year in which the sound recording or the first fixation of the audio-visual work was first lawfully published or lawfully communicated to the public, whichever is the earlier, or in the absence of such publication or communication, from the end of the year in which the first fixation was made. The exclusive rights protected are the reproduction, rental and lending, distribution and making available to the public;

- Broadcaster's rights which are protected for a period of 50 years commencing from the end of the year in which the broadcast was first transmitted whether by wire or over the air, be it by cable or satellite. The exclusive rights protected are the fixation, reproduction, distribution or fixation, re-broadcasting and communication to the public of their broadcasts and making available to the public.

6.2.3 'Sui Generis' Rights

The Copyright Act protects what are called *sui generis* rights in respect of both databases and semiconductor product topographies.

Notwithstanding the protection afforded by those provisions of the Copyright Act dealing with copyright protection in respect of a database as a work per se, the Copyright Act also provides that the maker of a database who can show that there has been qualitatively or quantitatively a substantial investment in either the obtaining, verification or presentation of the contents of the database has, irrespective of the eligibility of that database or its contents for copyright protection, the right to authorise or prohibit acts of extraction or re-utilisation of its contents, in whole or in substantial part, evaluated qualitatively or quantitatively.

The Copyright Act provides that creators of semiconductor product topographies and their successors in title have the exclusive right to authorise or prevent in Malta the reproduction of the topography and the commercial exploitation or the importation for the purpose of commercial exploitation of the topography or of a semiconductor product manufactured by using the topography.

6.2.4 Civil Remedies for Infringement of Copyright, Neighbouring Rights and 'Sui Generis Rights'

The Copyright Act contemplates the following scenarios where infringement occurs:

(i) copyright is infringed where a person does or causes any other person to do, without a licence from the owner or right holder, an act the doing of which is controlled by copyright;

(ii) copyright, neighbouring rights or sui generis rights are infringed where a person, without the licence of the copyright owner or right holder, imports into Malta, possesses in the course of trade or sells or lets for hire, or offers or exposes for sale or hire an article the sole intended purpose of which is to facilitate the unauthorised removal or circumvention of any technical device which may have been applied to protect a work or other subject matter eligible for copyright against being copied, seen, viewed, heard or otherwise perceived;

(iii) the moral rights of a person enjoying copyright or neighbouring rights are infringed if any other person mutilates, modifies, distorts the protected work or subjects it to any other derogatory action during its term of copyright in a way prejudicial to the honour or reputation of the author.

A person who infringes copyright, neighbouring rights or sui generis rights is liable to the payment of damages or the payment of a fine and to the restitution of all the profit derived from the infringement of the copyright. Delivery up of the infringing material in the possession of the person infringing copyright can also be ordered by a court.

6.2.5 Criminal Sanctions for the Violation of Copyright

The Criminal Code (Chapter 9 of the Laws of Malta) provides that whoever for gain, or by way of trade, prints, manufactures, duplicates or otherwise reproduces or copies, or sells, distributes or otherwise offers for sale or distribution, any article or other thing in violation of the rights of copyright is liable to the payment of a fine not exceeding €11,647 and/or to imprisonment for up to one year. Moreover, a trader found guilty of such offence shall have his trading licence automatically terminated upon conviction.

6.3 Patents

6.3.1 Patents

Patent rights are regulated by means of the Patents and Designs Act (Chapter 417 of the Laws of Malta, herein "PDA").

Inventions which are new, involve an inventive step and are susceptible of industrial applications are held to be patentable. Such inventions are also patentable if they concern a product consisting of or containing biological material or a process by means of which biological material is produced, processed or used.

However, the following are not regarded as inventions for the purposes of the PDA:

- discoveries, scientific theories and mathematical methods;
- aesthetic creations;
- schemes, rules and methods for performing mental acts, playing games or doing business and programs for computers; and
- presentations of information.

Patent protection is not granted in relation to inventions which are contrary to public order or morality; and in relation to inventions concerning the human body at its various stages of formation including gene sequences, processes for cloning and DNA sequences not containing technical information or indications of its function.

6.3.2 Patent Applications

The application form for a patent must be presented to the Office of the Comptroller of Industrial Property which is responsible for the registration of patents and designs. At the moment of filing the relative application for registration of a patent in Malta, a duly executed original Power of Attorney duly witnessed is required. The witness will confirm the signatory's identity and signature and (in the case of a body corporate) the signatory's authority to act for and bind the body corporate with his signature.

The application form must include the following details:

(i) a request for the grant of a patent;

(ii) a description of the invention;

(iii) one or more claims;

(iv) any drawings referred to in the description or in the claims;

(v) an abstract of the invention;

(vi) the title of the invention, which must clearly and concisely state the technical designation of the invention; and

(vii) the name of the inventor/s or if the applicant is not the inventor or the sole inventor, the legal grounds entitling him to file the application.

The application must disclose the invention in a manner sufficiently clear and complete for the invention to be carried out by a person skilled in the art.

The claims included in the patent application define the matter for which patent protection is sought. These must be clear and concise and supported by adequate descriptions. The claims contain a statement indicating the designation of the subject-matter of the invention and the technical features necessary for the definition of the subject-matter. The abstract then provides technical information but is not taken into account for the interpretation of the claims.

The filing date of a patent application is an essential consideration. Patent applications are considered to be part of the prior art, therefore an application is sufficient to prevent another similar invention from being patented. For the purposes of the PDA, the filing date of the application is the date when the Office of the Comptroller receives the documents containing:

(i) an express or implicit indication that the granting of a patent is sought;

(ii) indications allowing the identity of the applicant to be established; and

(iii) a description of the invention for which a patent is applied.

Therefore not all the requirements of the application must be included in order to successfully file an application. For the purposes of establishing a filing date, the above requirements are sufficient. The applicant is then given sixty working days within which to submit all the documentation. A fee (currently of 58.23) is also payable.

The application may contain a declaration claiming priority pursuant to the Paris Convention for the Protection of Industrial Property, of one or more earlier national, regional or international applications filed by the applicant or his predecessor, in or for any state which is party to the same Convention or for any State with which there is an international arrangement for mutual protection of inventions.

The Office of the Comptroller will generally require the applicant to provide a copy of the earlier application. Once the patent application is filed, the Office of the Comptroller shall determine whether the application complies with the necessary requirements. The Office of the Comptroller may request the applicant to amend the application as required. If the applicant refuses to make such amendments within the specified time, the Office of the Comptroller shall refuse the application. If this is not applicable, the Office shall publish the application after eighteen months from the filing date or when priority is claimed, from the priority date.

The Comptroller may require applicants for a patent to submit a search report accompanied by a reasoned opinion issued by an international search authority recognised by WIPO. The search report lists documents forming part of the prior art which are taken into consideration to determine whether the invention in question is patentable.

6.3.3 European Patent Applications

It is also possible to file European patent applications designating Malta by means of the European Patent Convention Regulations (Subsidiary Legislation 417.05 of the Laws of Malta). European patent applications may be filed with the Office of the Comptroller along with the prescribed fee.

Within one month of filing the European patent application, the applicant must also file an English translation of an indication that a European patent is sought and the information which would allow the applicant to be identified.

European patent applications designating Malta shall be equivalent to a national application and where appropriate, with the priority claimed for the European patent application. Once the patent application is published, this confers the same rights as a national patent application and a grant of the patent by the European Patent Office will likewise confer the same rights as a national patent granted by the Office of the Comptroller.

A European patent application designating Malta may be converted into a national patent application if the European patent application is withdrawn or a translation has not been filed in due time, subject to the payment of a fee.

Where a European patent designating Malta and a national patent have the same filing date, or where priority has been claimed, the national patent shall have no effect to the extent that it covers the same invention as the European patent. This is applicable as from the date on which the time-limit for filing an opposition to the European patent has expired without an opposition being filed, or, if such an opposition was filed, from the date of a final decision maintaining the European patent.

Unified patent applications may not be filed under Maltese law. It is possible however to file international patent applications under the Patent Cooperation Treaty Regulations (Subsidiary Legislation 417.04 of the Laws of Malta) pursuant to the Patent Cooperation Treaty.

6.3.4 European Patent Organisation ("EPO") Validations

Malta is a signatory to the European Patent Convention which provides a legal framework for the granting of European patents, or as they are more commonly referred to, unitary patents. The European Patent Convention was ratified and entered into force in Malta on 1st March 2007.

A patent filed with the EPO which designates Malta as one of the states where patent protection is sought, can be validated by filing a form at the IPRD. The procedure varies according to whether the patent has been filed in the English language. If it has been filed in the English language and Malta was a designated state, then the patent will automatically be validated.
If the patent filed with EPO is in a foreign language, then the following documents need to be submitted:

(i) the Application form;

(ii) a translation of the specification in English;

(iii) a duly signed power of attorney;

(iv) a copy of the decision to grant issue by the European Patent Office; or

(v) a copy of the front page of the published patent (if already available)

6.3.5 Patent Rights

The term of protection of a patent is 20 years from the filing date of the application. This is subject to the payment of a maintenance fee which is due in the third year of protection and each subsequent year thereafter, calculated from the filing date of the application.

Patents have no effect against persons who, in good faith, before the filing date or before the priority date, were using the invention or were making effective and serious preparations for such use.

Any such person has the right for the purposes of his enterprise or business to continue to such use. This right may only be transferred or devolve together with his enterprise or business.

Where a patent concerns a product or process, the proprietor of the patent shall have the right to prevent third parties from performing, without his authorisation, the following acts:

(i) the making of a product or the use of a product incorporating the subject matter of the patent;

(ii) the offering or the putting on the market of a product or one obtained by the use of a patented process, incorporating the subject matter of the patent, the use of such product, or the importation or stocking of such product;

(iii) the inducing of third parties to perform any of the acts above.

The PDA provides certain instances when the proprietor of a patent cannot prevent the use of the subject matter of the patent. These include when the act is done privately or for non-commercial purposes (where this does not prejudice the economic interests of the proprietor) or solely for experimental purposes of scientific research

It should be noted that Maltese patent law provides for an exception as regards acts which are solely done for the development and presentation of information for the production, use or sale of medicinal or pharmaceutical products. Such acts may be carried out prior to the expiry of the term of protection afforded by patent law without being considered to be an infringement of patent rights.

6.3.6 Assignment and Licences of Patents

It is important to note that the assignment of patents or patent applications must, on pain of nullity, be effected by a written contract signed by both parties. The change of ownership must also be recorded in the patent register. The new proprietor shall only be entitled to institute legal proceedings in regard to the patent once he has been recorded in the register as the new owner.

The transfer or assignment of patents shall not affect rights acquired by third parties before the

date of such transfer or assignment and shall only have effect in regard to third parties after entry thereof has been made in the patent register, unless such third parties knew of the transfer or assignment on the date on which their rights were acquired.

Patent applications or patents may also be licensed in whole or in part for the whole or part of Malta. Licence contracts must, on pain of nullity be made in writing and signed by both parties, however, unlike assignments, registration of these rights is optional. Third party rights acquired prior to registration however, are the same as for assignments therefore it is prudent to register all interests acquired by means of a licence agreement.

Patents, patent applications and priority claims may also be revoked upon notice being given to the Office of the Comptroller. A right of appeal which shall have a suspensive effect may be made from such a decision.

6.3.7 Infringement Proceedings

Any person who exploits an invention which is the subject matter of a patent or a patent application is liable in damages towards the proprietor of the patent or patent application as well as the licensee. A specialised tribunal in relation to disputes concerning patents, the Patents Tribunal, has been recently introduced.

This tribunal has jurisdiction to hear and determine issues concerning claims for the revocation of a patent, infringement claims, applications for declarations of non-infringement as well as precautionary actions related to the above.

It should be noted however that claims for damages arising from infringements are determined by the First Hall Civil Court. The rules of procedure applicable to proceedings of the Patent Tribunal are the same as those applicable to proceedings of the court of civil jurisdiction, with both parties given the opportunity to file and present evidence, including expert evidence.

Infringement proceedings should be brought before the Patents Tribunal and may not be instituted after five years from the date when the injured party has obtained knowledge of the infringement and of the identity of the alleged infringer.

It is also possible to institute criminal actions in regard to infringements. In such case, a person on conviction shall be liable to a fine of not less than 232.94 and not more than 11,646.87.

6.3.8 Unitary Patents

Malta signed the Agreement on a Unified Patent Court (2013/C 175/01) on 19th February 2013 as one of the initial signatory Member States. However, it has not adopted the possibility of setting up a regional or Unified Patent Court pursuant to this Agreement.

6.4. Designs

6.4.1 Legal Protection of Designs

Designs are also regulated by means of the PDA. A design is defined as "the appearance of the whole or a part of a product resulting from the features of, in particular, the lines, contours, colours, shape, texture and, or materials of the product itself and, or its ornamentation". A design is eligible to legal protection under the PDA if it is new and has individual character.

A design is considered to be new if no identical design has been made available to the public before the date of filing for registration or, if priority is claimed, the date of priority. A design is considered to have individual character if the overall impression it produces on the informed user differs from the overall impression produced on such a user by any earlier design.

The criteria for establishing whether a design has been disclosed to the public are similar to those applicable to patents. A design is considered to have been made available to the public if it has been published following registration or otherwise exhibited, used in trade or otherwise disclosed. This is subject to the exception that disclosure shall not be taken into account for the purposes of design protection, except where these events could not reasonable have become known in the normal course of business to the circles specialised in the sector concerned.

6.4.2 Refusal for Registration

A design will be refused registration:

(i) if the design does not fall within the definition of a design as set out above;

(ii) if it consists of, or is significantly made of up the national flag of Malta;

(iii) if it contains a representation of the national flag of Malta and it appears to the Comptroller to be misleading or offensive;

(iv) if it consists of or contains words or insignia related to the Roman Catholic Archbishop or President of Malta;

(v) if it is contrary to public policy or morality; or

(vi) if the applicant for the right in a registered design is not entitled to it under Maltese law.

6.4.3 Rights Conferred by a Registered Design

The registration of a design confers on its holder the exclusive right to use it and prevent any third party not having his consent from using it. The term 'use' includes the marking, offering, putting on the market, importation, export or use of a product in which the design is incorporated or to which it is applied, or stocking such a product for such purposes.

It should be noted that infringement proceedings may not be commenced before the date on which the design is registered.

The rights conferred by a design right upon registration do not preclude acts done privately and for non-commercial purposes or for experimental purposes. It also does not preclude acts of reproduction for the purposes of making citations or of teaching, provided these are compatible with fair trade practice and do not unduly prejudice the normal exploitation of the design and that mention is made of the source.

6.4.4 Applications for the Registration of a Design

The following information and documentation would be required at the moment of filing the relative application for registration of a (i) a national design; or (ii) a registered Community design:

a duly executed original power of attorney duly witnessed where the witness will confirm the signatory's identity and signature and (in the case of a body corporate) the signatory's authority to act for and bind the body corporate with his signature;

(i) a request for the registration of a design;

(ii) the name and address of the applicant;

(iii) the design which is the subject matter of the application;

(iv) the name and address of the agent or representative if applicable; and

(v) a declaration claiming priority in cases where the applicant wishes to take advantage of an earlier application.

The date of filing for an application for registration of a design is the date on which these elements are provided to the Comptroller or the EUIPO. The application for a design should also designate the classes for which the design is to be registered. These classes are those listed in the Locarno Classification administered by WIPO.

For applications for a registered design in Malta, once the application is submitted, the applicant must pay the prescribed fee within thirty days. The registration of a design may be declared invalid if the requirements of registration are not met or it is similar to a prior design which has been made available to the public after the date of filing of the application or date of priority where applicable. The registration may also be refused if it constitutes the unauthorised use of work which is protected under copyright.

6.4.5 Transfers and licensing of designs

Designs may be licensed or assigned. Assignment of a registered design must be made in writing and signed by or on behalf of the assignor or his personal representative.

The assignment or the grant of a licence in a registered design may be registered however this is not legally required. As previously stated, it is always prudent to register any rights in Intellectual Property. This is particularly true because until an application has been made for registration of an assignment or licence such a transaction is ineffective against a person acquiring in good faith a conflicting interest in the registered design and unregistered licensees do not have the right to institute infringement proceedings. This applies also to applications for the registration of a design.

6.5 Remedies In Case of Infringement of IP Rights

6.5.1 Cross-border measures

The Intellectual Property Rights (Cross-Border Measures) Act, (Chapter 414 of the Laws of Malta) is aimed at prohibiting the entry into Malta, export or re-export, release for free circulation, temporary importation, placing in a free zone or free warehouse, of goods found to be infringing an intellectual property right. The term "goods infringing an intellectual property right" is widely

defined to include counterfeit goods (including trademark symbols), pirated goods which infringe copyright or neighbouring rights and goods infringing a patent.

The holder of an intellectual property right or any other person authorised to use that intellectual property right, or a representative thereof, may also lodge an application in writing with the Malta Comptroller of Customs for action by the Customs authorities where goods alleged to infringe intellectual property rights are placed in one of the above-described situations. Special procedures are contemplated by this Intellectual Property Rights (Cross-Border Measures) Act for action to be taken in accordance with the applicable circumstances by the Comptroller of Customs and/or by the courts in civil judicial proceedings in connection with the goods.

The application must contain a detailed description of goods which is sufficient to allow Customs authorities to recognise them and proof that the applicant is the holder of the right for the goods in question. It must also be shown on a prima facie basis that the goods infringe the right being asserted.

The proof required for these purposes when the applicant is the right holder includes:

- proof of registration of a trademark, patent or design or proof of lodging for an application for registration; and
- in the case of copyright, neighbouring right or design that is unregistered or for which an application has not been lodged, any proof of authorship or the person's status as original holder.

Where the application is made by another person authorised to use an intellectual property right, the above proof must also be submitted as well as a document by virtue of which the person is authorised to use the right in question. This generally refers to a licence agreement.

Where the application is made by a representative of the right holder or the person authorised to use the intellectual property right, apart from the proof mentioned above, proof of authorisation to act must also be produced. This refers to a signed power of attorney granted to such a representative.

In the case of pirated goods or goods infringing patents, the information should also include, wherever possible:

(i) the place where the goods are situated or the intended destination;

(ii) particulars identifying the consignment or packages;

(iii) the scheduled date of arrival or departure of the goods;

(iv) the means of transport used; and

(v) the identity of the importer, exporter or holder.

The application presented to the Comptroller of Customs, irrespective of the intellectual property right in question should also specify the length of the period during which the Comptroller of Customs is requested to take action. The applicant is responsible to cover all administrative costs in dealing with the application and in implementing the decision of the Comptroller, which costs shall be determined by the Comptroller himself.

Where the Comptroller grants the application he must specify the period during which the Customs authorities will withhold the release of, or detain, the goods pending the initiation of civil judicial proceedings. This period may be extended upon application of the right holder. If the Comptroller refuses the application, it is possible to appeal from such a decision.

As a matter of procedure, the Comptroller may request the applicant to provide security to cover any possible liability on his part if the goods are found not to be infringing intellectual property rights and to ensure payment of the costs incurred in keeping the goods under Customs authority.

It is also possible for the Comptroller of Customs to take action *ex officio* when, on an inspection of goods, and before an application by the right holder has been lodged or approved, it appears *prima facie* evident that the goods are infringing an intellectual property right. In such a case, the right holder shall be notified and the Comptroller may suspend the release of the goods or detain them for a period of five working days to enable the right holder to lodge an application and initiate proceedings as described above.

Once the proceedings related to the enforcement of intellectual property rights are concluded, the Court shall then order the Comptroller of Customs to dispose of the goods found to be infringing an intellectual property right or order him to destroy such goods without compensation at the cost of the importer, exporter or owner of the goods, as well as take any other measure to deprive the persons concerned of the economic benefits of the transaction.

6.5.2 Actions for Damages

6.5.2.1 Procedure

The enforcement of intellectual property rights and the damages which may be claimed are regulated by means of the Enforcement of Intellectual Property Rights (Regulation) Act (Chapter 488 of the Laws of Malta, herein "Enforcement Act"). This allows right holders or persons authorised to use intellectual property rights to avail themselves of various measures and procedures to enforce their intellectual property rights.

Such proceedings may also be initiated by recognised collecting societies and professional defence bodies which are recognised as representing IP right holders by virtue of Control of the Establishment and Operation of Societies for the Collective Administration of Copyright Regulations (Subsidiary Legislation 415.01 of the Laws of Malta).

Any person so entitled to avail himself of the provisions of the Enforcement Act may file an application requesting a Court order to the effect that evidence which is in the control of an opposing party be presented in Court, subject to the protection of confidential information. Such an application must be accompanied by reasonably available evidence sufficient to support his claims. For this purpose a reasonable sample of copies of a work or any other protected object constitutes reasonable evidence.

The right holder is also given the faculty to file an application for the Court to order such prompt and effective provisional measures as it considers appropriate to preserve relevant evidence in respect of the alleged infringement, upon reasonably available evidence being presented supporting the applicant's claim that his intellectual property right has been infringed or is about to be infringed. Such provisional measures include the detailed description with or without the taking of samples or the physical seizure of the infringing goods and where appropriate, the materials and implements used in the production and/or distribution of the said goods and the documents relating thereto. The competent Court may also, if it considers it necessary, order such measures be taken without the other party having been heard, in particular where any delay is likely to cause irreparable harm or where the Court considers there is an evident risk of the evidence being destroyed.

When measures to preserve evidence are adopted without the other party having been heard, the parties affected shall be given notice without delay after the execution of the measures. A review shall take place upon request by application of any of the parties affected with a view to deciding, within a reasonable period after the notification of the measures, whether the measures shall be modified, revoked or confirmed.

Once the infringement proceedings are initiated, the Court may order that information on the origin and distribution networks of the goods or services which infringe an intellectual property right be produced by the infringer or any other person using the infringing goods or providing or using the infringing services on a commercial scale.

Once the case is decided by the Court, in relation to the infringing goods, the applicant may request the court to order corrective measures including:

- recall from circulation within the channels of commerce;
- definitive removal from circulation within the channels of commerce; or
- destruction of the items.

6.5.2.2 Damages which may be claimed

If the Court finds that the goods or services complained of are in fact infringing an intellectual property right, it shall order the infringer who has knowingly, or being reasonably expected to know, engaged in such infringing activity to pay damages commensurate with the prejudice suffered by the right holder.

In setting the amount of damages due, the Court shall take into account the following:

- all the negative economic consequences that may have been suffered by the right holder including lost profits;
- unfair profits made by the infringer (the profits made during the period when the infringing activity was carried out); and
- any other elements deemed appropriate such as the moral prejudice caused to the right holder.

6.6 Franchising

Our firm has assisted several clients in establishing franchise operations in Malta, especially, though not exclusively, in the food and catering, fashion clothing and professional cleaning trades, by advising on the relevant franchise documentation and providing related trademark registration and ancillary services.

At the current stage of economic development, most franchises contracted in Malta are international or cross-border franchise arrangements entered into between foreign franchisors and local entrepreneurs as franchisees. However, in recent years, some local businesses have developed, on a purely autochthonous level, into proper franchise networks. It is likely that the opportunities for foreign and local brand names operating on a franchise formula within Malta will continue to increase.

In common with several typically civil law systems, Maltese law does not specifically regulate franchises or franchise agreements.

No mandatory elements are prescribed by law concerning the content of a franchise agreement, while there is neither any requirement at law for the registration of a franchise agreement nor any provision permitting such registration.

Franchise agreements are essentially innominate and hybrid or "sui generis" contracts which do not fall squarely within the parameters of any of the institutes of law under the Civil Code (Chapter 16 of the laws of Malta).

However, the general principles of civil and commercial law apply. In fact, franchise agreements ordinarily contain various elements of our civil law and other statute law, and thus existing laws regulating intellectual property, especially insofar as concerns trademarks, patents and licensing, agency, competition, lease, and taxation become relevant.

It might be added that our Civil Code (contrary to the legislation of some countries) draws no specific distinction between "contracts of adhesion" - in which the essential stipulations are imposed or drawn up by one of the parties, on his behalf or on his instructions, and are not negotiable - and "contracts by mutual agreement". As, in practice, most franchise agreements are invariably contracts of adhesion, this means that no special protection is conferred by our law to an "adhering" party (the franchisee) in the context of a franchise agreement. The Civil Code does recognise that contracts may be either (i) "unilateral", when one party binds itself to the other without any obligation on the part of the latter; or (ii) "commutative", when one party binds himself to give or do a thing which is considered to be the equivalent of that which is given to or done for him by the other party. However, the principle "pacta sunt servanda" is pre-eminent under our law. Having said this, the Civil Code provision that contracts must be carried out in good faith militates to some extent against the "unilateral" characteristics typical of contracts of adhesion.

6.7 Trade Secrets

The protection of trade secrets has steadily gained importance in recent years due to the advent of our modern knowledge-based economy which relies on information and inventiveness as building-blocks for growth. The EU has taken cognizance of this development and has enacted Directive (EU) 2016/943 of 8 June 2016 on the protection of undisclosed know-how and business information (trade secrets) against their unlawful acquisition, use and disclosure (the "Directive"). This should be transposed into Member State law by 9 June 2018.

The Directive follows the definition of a trade secret established by the TRIPS Agreement and defines a trade secret as information which meets the following requirements:

(i) it is secret in the sense that it is not, as a body or in the precise configuration and assembly of its components, generally known among or readily accessible to persons within the circles that normally deal with the kind of information in question;

(ii) it has commercial value because it is secret; and

(iii) it has been subject to reasonable steps under circumstances, by the person lawfully in control of the information, to keep it secret.

It is possible for the acquisition of a trade secret to be considered lawful when it is obtained by any of the following means:

- independent discovery or creation;
- observation, study, disassembly or testing of a product that has been made available to the public or that is lawfully in the possession of the acquirer of the information who is free from any legally valid duty to limit the acquisition of the trade secret;
- exercise of the right of workers' or workers' representatives to information and consultation in accordance with EU law and national laws and practices; and
- any other practice which, under the circumstances, is in conformity with honest commercial practices.

6.7.1 Unlawful acquisition, use and disclosure of trade secrets

The acquisition of a trade secret without the consent of the trade secret holder is considered unlawful whenever carried out by:

- unauthorised access to, or appropriation of, or copying of any documents, objects, materials, substances or electronic files, lawfully under the control of the trade secret holder, containing the trade secret or from which the trade secret can be deduced;
- any other conduct which, under the circumstances, is considered contrary to honest commercial practices.

In particular, the use of a trade secret shall be considered unlawful when carried out without the consent of the trade secret holder by a person who acquired the trade secret unlawfully, is in breach of a confidentiality agreement or is in breach of a contractual or any other duty to limit the use of the trade secret. This is particularly relevant in terms of employees whereby employment contracts should specify that any trade secrets such as technical processes, know-how or client lists (by way of example) cannot be disclosed by means of non-disclosure and confidentiality clauses.

The use of non-disclosure agreements for the purposes of ensuring confidentiality and protection of trade secrets has become common practice in Malta, both in commercial transactions as well as in employment contracts. This said, fiduciary obligations are afforded express regulation under the Maltese Civil Code and trade secrets would be treated as imposing such obligations.

6.7.2 Remedies for Infringement

Malta, as an EU Member States is bound to provide for measures and procedures in order for effective remedies to be made available in cases of the unlawful acquisition, use and disclosure of trade secrets.

Member States must ensure that the parties, their lawyers or representatives and any other person participating in legal proceedings, including court officials, witnesses and experts and all persons who have access to documents which form part of those legal proceedings are not permitted to use or disclose any trade secret or alleged trade secret which the competent judicial authorities have, in response to a duly reasoned application by an interested party, identified as confidential.

The competent judicial authorities must also be empowered to take specific measures to preserve the confidentiality of any trade secret or alleged trade secret used or referred to in the course of legal proceedings.

The Directive also enjoins Member States to ensure the possibility of the institution of provisional and precautionary measures including:

- the cessation or the prohibition of the use or disclosure of the trade secret on a provisional basis;
- the prohibition of the production, offering, placing on the market or the use of infringing goods, or the importation, export or storage of infringing goods; or
- the seizure or delivery up of the suspected infringing goods, including imported goods, so as to prevent their entry into or circulation on, the market.

Under ordinary civil proceedings in Malta, it is possible to file for the issuance of a precautionary warrant of prohibitory injunction to prevent the taking of those actions which the applicant for the warrant may request. It is also possible to lodge an application for the issuance of a garnishee order to secure a right of credit over the defendant's assets.

The criteria established by the Directive to decide whether or not to grant or reject the application for infringement of a trade secret are the following:

(i) the value and other specific features of the trade secret;

(ii) the measures taken to protect the trade secret;

(iii) the conduct of the respondent in acquiring, using or disclosing the trade secret;

(iv) the impact of the unlawful use or disclosure of the trade secret;

(v) the legitimate interests of the parties and the impact which the granting or rejection of the measures could have on the parties;

(vi) the legitimate interests of third parties;

(vii) the public interest;

(viii) the safeguard of fundamental rights.

Once the case is decided, the Court may then order:

- the recall of the infringing goods from the market;
- depriving the infringing goods of their infringing quality; or

- destruction of the infringing goods or, where appropriate, their withdrawal from the market, provided the withdrawal does not undermine the protection of the trade secret in question.

The competent judicial authorities upon the request of the injured party shall order an infringer who knew or ought to have known that they were engaging in the unlawful acquisition, use or disclosure of a trade secret, to pay the trade secret holder damages appropriate to the actual prejudice suffered as a result of the unlawful acquisition, use or disclosure of the trade secret.

In calculating damages, the judicial authorities must take into account all appropriate factors including the negative economic consequences, including lost profits, which the injured party has suffered, any unfair profits made by the infringer and, in appropriate cases, elements other than economic factors, such as the moral prejudice caused to the trade secret holder by the unlawful acquisition, use or disclosure of the trade secret. The court may also set the damages as a lump sum on the basis of elements such as the amount of royalties or fees which would have been due had the infringer requested authorisation to use the trade secret in question.

6.8 Telecommunications

Telecommunications in Malta is regulated by the Electronic Communications (Regulation) Act (Chapter 399 of the Laws of Malta, herein "ECRA"). Article 4 of the Act lays down the policy objectives which are sought to be achieved by this Act. In particular it seeks to ensure that competition in this sector is encouraged by ensuring that there are no distortions or restrictions of competition and encouraging efficient use and management of radio frequencies and numbering resources.

This emphasis on competition is also present on a European level, with the Malta Communications Authority (as the designated responsible authority) (the "MCA") charged with ensuring the development of the internal market by removing obstacles to the provision of electronic communications networks on an EU level; ensuring the availability of information; consumer choice; personal data protection and addressing the needs of certain social groups such as elderly end-users and end-users with special social needs.

6.8.1 Applicability of the ECRA

This Act applies to the various electronic communications markets however it does not apply to the content of any communications.

6.8.2 Electronic Communications Networks and Services - Authorisation

Any person may install or operate any electronic communications network or provide any electronic communication service in Malta as long as they comply with the provisions of the Act. The provision of such services or network, may only be subject to a general authorisation.

Any person who intends to provide an electronic communications network and, or electronic communications service shall, before doing so, notify the Authority of his intention to provide such a network and, or service. Undertakings providing cross-border electronic communications services to undertakings located in several member states shall not be required to submit more than one notification per Member State concerned.

Individual licences are issued for the use of spectrum and numbering resources that are deemed to be scarce resources. The assignment of such licences is made in accordance with the principles of transparency and following public policies.

6.9 E-Commerce

The Electronic Commerce Act (Chapter 426 of the Laws of Malta, herein the "ECA") transposes the provisions of Directive 2000/31/EC on certain aspects of information society services, in particular electronic commerce in the internal market.

6.9.1 Electronic contracts

An electronic contract cannot be denied legal effect, validity or enforceability on the grounds that it is wholly or partly in electronic form or has been entered into wholly or partly by way of electronic communications or otherwise. This allows online transactions to be carried out and goods and services to be bought freely online.

This is subject to general provisions of contract law. Under the Civil Code (Chapter 16 of the Laws of Malta) a contract is valid when the parties give their consent and when there is agreement as to the object and its price.

The issue then revolves around the moment in time when the consent required for the formation of a valid contract is given. The ECA provides that an offer and an acceptance of an offer can be communicated by means of electronic communications.

Unless otherwise agreed by the parties who are not consumers, an electronic contract is concluded

when after placing his order, the recipient of the service receives an acknowledgement of receipt of the order made by the recipient. The order made by the recipient and the acknowledgement of receipt are deemed to have been received when the parties to whom they are addressed are able to access them.

Advising clients and service providers on their obligations in respect of electronic contracts in order to ensure that those contracts are compliant with Maltese law has become increasingly important given the additional reliance on technology and the internet to conclude commercial contracts.

6.9.2 Intermediary Service Providers

The ECA makes provision for service providers which are not directly involved in the provision of electronic commercial transactions but merely facilitate the provision of such services. This is an important distinction as regards liability.

The ECA provides that where an information society service is provided and such service consists in the transmission of information provided by the recipient of the service or the provision of access to a communication service, the provider of such a service shall not be liable for the information transmitted, other than under a prohibitory injunction. This is subject to the proviso that the provider:

- does not initiate the transmission;
- does not select the receiver of the transmission; and
- does not select or modify the information contained in the transmission.

The acts of transmission and of the provision of access referred to include the automatic intermediate and transient storage of the information transmitted in so far as this takes place for the sole purpose of carrying out the transmission in the communication network and provided that the information is not stored for any period longer than is reasonably necessary for the transmission.

The temporary storage of data for the transmission of information in a communication network is referred to as caching. The provider of caching services shall not be liable for damages for the automatic, intermediate and temporary storage of that information, performed for the sole purpose of making the transmission to the recipient's more efficient provided that the caching service provider:

(i) does not modify the information;

(ii) complies with the conditions on access to the information;

(iii) complies with any conditions regulating the updating of information;

(iv) does not interfere with the technology used to obtain data on the use of the information; AND

(v) the provider acts expeditiously to remove or to bar access to the information upon obtaining actual knowledge of the information at the initial source of the transmission has been removed, access to it has been barred or the Court or a competent regulator has ordered such removal or barring.

Another intermediary service is that of hosting. This consists of the storage of information provided by a recipient (and not the transmitter) of information on an electronic network. The provider of caching services shall not be liable for damages for the information stored at the request of a recipient of the service provided that:

(i) the provider does not have actual knowledge that the activity is illegal and is not aware of facts or circumstances from which illegal activity is apparent; or

(ii) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information

Notwithstanding the exemption from liability allowed to intermediary service providers, they are obliged to promptly inform public authorities competent in the matter of any alleged illegal activity undertaken or information provided by recipients of their service and shall grant to any such authority upon request information enabling the identification of recipients of their service with whom they have storage agreements. However, this obligation does not place intermediary service providers under a duty to monitor information which they transmit or store or to actively seek facts or circumstances indicating illegal activity.

CHAPTER 7: SECURITY INTERESTS

7.1 General

Being fundamentally a Civil Law system, Maltese law may be categorised as having a "pro-debtor" bias, following the Roman Law tradition. This appears most markedly in the way the law deals with the creation of "security interests" (or loosely, "collateral") and their enforcement. Maltese law does not leave the issue completely to the will of the parties and is rather formal in its regulation. The Civil Code, (Chapter 16 of the Laws of Malta, the "Civil Code") originally provided for an exhaustive list of security a creditor can take. This list has now been supplemented by the Merchant Shipping Act, (Chapter 234 of the Laws of Malta) and the Aircraft Registration Act (Chapter 503 of the Laws of Malta, which has also ratified the Cape Town Convention on International Interests in Mobile Equipment and its Aircraft Protocol, the "Cape Town Convention") which provide for specific forms of security in relation to ships and aircraft. Other arrangements will not have the effect of validly creating preferential or executive rights. The types of security in Maltese law may be divided into "real" security and "personal" security. The forms of "real" security encumbering movable or immovable property and other assets include:

a. Pledges;

b. Privileges;

c. Hypothecs;

d. Maritime special privileges;

e. Mortgages over ships;

f. Mortgages over aircraft;

g. Registration of Security Interests over aircraft in terms of the Cape Town Convention; and

h. Security by Title Transfer.

The general principle is that a creditor cannot enforce his rights, except through appropriate court procedures. This principle would apply notwithstanding any express stipulation to the contrary in the agreement itself. Over the years, however, this principle has been eroded by some specific laws which apply in specific contexts.

7.2 Types of Real Security

7.2.1 Pledges of Movables, Debts and Rights over Movables

Pledges of tangible movable items and bearer titles are created by delivery of the item or the document of title. Pledges of debts and other rights (intangibles) are created by means of a private writing and affect third parties only if the debtor is notified of the pledge or otherwise acknowledges it in writing. A pledge creates the highest rank of priority and confers on the creditor the right to obtain payment with privilege over other creditors.

7.2.2 Pledges of Shares

The Companies Act, (Chapter 386 of the Laws of Malta, the "Companies Act") regulates in detail the pledging of securities in a company. The pledging of securities was not specifically provided for by the Civil Code.

The Companies Act provides that securities in public companies may be pledged by their holder in favour of any person as security for any obligation, unless the Memorandum or Articles of Association of the company or the conditions of issue of such securities provide otherwise. Securities in private companies cannot be pledged by their holder unless this is specifically allowed by the Memorandum or Articles of Association of the company. The law deals with the effects of the pledge on transfers of securities, dividends, voting, and capital deductions. The pledge of securities must be done in writing. Notice of the pledge must be delivered in writing to the company and to the Registry of Companies within 14 days from the grant of the pledge. The pledge is effective with regard to third parties only after the registration by

the Registry of Companies of the said notice. Notice requirements also exist in the case of a pledge of securities in a public company listed on a recognised investment exchange by which the exchange is notified of the pledge of securities.

In case of default under the pledge agreement the pledgee, upon giving notice by judicial act to the pledgor, is entitled to either dispose of the securities which are pledged in his favour or appropriate and acquire the securities himself in settlement of the debt due to him or part thereof, after agreement on the value of the shares. In the absence of an agreement, there are court procedures to determine the fair value. Where the pledgor defaults in fulfilling his obligations and the shares pledged are in a private company, then the shares must first be offered to the other shareholders of the company before being submitted for sale to the public.

Since the coming into force in Malta of the Financial Collateral Arrangement Regulations, 2004 (the "Financial Collateral Regulations") through Legal Notice 177 of 2004 (as amended), the enforcement of the above types of pledges and other financial collateral arrangements has been facilitated. The above-described Companies Act rules which impose restrictions on the process of valuation and appropriation of pledged shares by the pledgee are in fact disapplied by the Financial Collateral Regulations. When these regulations are applicable, the only requirement for the enforcement of the financial collateral arrangements is for the collateral taker to ensure that any action taken in terms of these regulations is conducted in accordance with the terms of that arrangement, in a commercially reasonable manner and in good faith so as to ensure fair treatment to the collateral provider. There is thus no need for judicial notification of the debtor by the pledgee prior to enforcement, nor is there the need for the pledgee to observe pre-emption rights existing in private companies (unless of course this is provided for in the financial collateral arrangement itself). The legal formalities for the creation of a share pledge must, however, still be observed. In the case of book-entry securities, the position is even more favourable because, in terms of the regulations, there are no formalities for the creation of this type of security so long as the collateral (as the term is defined by the said regulations) is provided and is evidenced in writing.

The Financial Collateral Regulations apply where the financial collateral has been provided, can be evidenced in writing and consists of cash or instruments or credit claims. These regulations do not apply where either the collateral taker or the collateral provider are physical persons but rather only apply where the collateral taker and provider are set up as one of the entities listed within the regulations themselves, such as, a public authority or a licensed bank or credit institution.

To our knowledge, no Maltese court judgement has ever pronounced itself on these Financial Collateral Regulations.

7.2.3 Privileges

Privileges are mostly created by law and can broadly be compared to "liens" in other systems of law. They constitute a lawful cause of preference and as such rank in precedence to hypothecs but after pledges. They may apply to all of a debtor's estate (e.g. wages of servants or funeral expenses) or to particular movables (e.g. freight charges over goods carried) or immovable property (e.g. builder's privilege over the property constructed). Some privileges are subject to registration within specified time periods, and failure to register implies the loss of the privilege. General privileges and special privileges over movable assets are not subject to registration.

A seller of immovable property also has a privilege over the property sold, for the whole or the balance of the price or for the performance of covenants stipulated in the deed of sale. The same privilege is available to a person who, by means of a public deed, has supplied the whole or part of the money for the payment of the price by the buyer (i.e. a lender). For this privilege to arise over the newly acquired property of the buyer (i.e. the borrower), it is vital that the deed of loan (taking the form of a public deed enrolled by a notary public) actually recites that the loan was made for the acquisition of the immovable property and the proceeds of the loan were actually paid to the seller. These formalities are necessary because the privilege on the property will grant priority to the lender and will thus affect third-party rights. The registration of the deed ensures proper publicity.

7.2.4 Hypothecs

A hypothec constitutes another lawful cause of preference. Hypothecs may be general and attach to all assets, present and future, of a debtor and are broadly comparable to floating charges under English law. They may also be special and attach to specific immovable assets. In addition, hypothecs may be judicial. The latter arise ex lege in favour of any creditor, even if unsecured, who has obtained a judgement against a debtor. Finally, there is what is called a legal hypothec which applies mainly in inter-family relations.

Hypothecs, whether judicial, legal or conventional (i.e. created by agreement), must be registered at the Public Registry if they are to take effect.

Hypothecs, other than judicial hypothecs, are created by a public deed executed in the presence of and attested by a notary public.

Once registered, a hypothec secures principal and interest and other obligations expressly secured in the deed creating it. A duly registered hypothec gives priority to the creditor and, being constituted by a public deed, grants the creditor an executive title if the debt it secures is a debt certain, liquidated and due. Such a creditor will enjoy the equivalent of a judgement. General hypothecs do not follow property on a sale nor do they impede a sale taking place. The only exception is in the case of an assignment of rights which remain subject to general hypothecs granted by the debtor prior to the assignment. A special hypothec does follow property in the hands of a purchaser of the specific property it encumbers.

Of particular interest is Article 2095E of the Civil Code which provides that when a hypothec is created in favour of a security trustee which is a bank, such hypothec may also be granted to secure future debts by the same debtor to the security trustee or the beneficiaries of the security trust, present or future. This is subject to the condition that the public deed constituting the hypothec expressly states that it secures future debts of the same debtor and limits the effects of the hypothec to a stated maximum sum.

7.2.5 Security by Title Transfer

Security by way of title transfer was not expressly recognised under Maltese Law until 1 October, 2010 when the new title under Malta's Civil Code on "Security by Title Transfer" came into force. Prior to this, security trusts were used to emulate results similar to those of security by title transfer through the settlement of property in favour of the trustee. This could be done by virtue of the provisions on security trusts introduced into the Civil Code in 2004. With the statutory recognition of security by title transfer, this was no longer necessary although the security trust remains a tool which facilitates the granting of security where a large number of creditors is involved.

Whereas "traditional" forms of security, such as pledge, operate by giving priority to the secured lender in a ranking scenario whilst leaving title to the secured asset vested in the borrower's hands, security by way of title transfer enables the borrower to actually transfer title to an asset to a lender. The lender is deemed at law to be the absolute owner of the property so transferred but will owe fiduciary obligations to the borrower. Interestingly, the object of title transfer can include future debts (for instance, giving future anticipated cash flows as collateral). If there is an event of default in such a scenario, the creditor need not resort to court to enforce the security but, on giving notice in writing to the borrower, the creditor may either sell the movable thing or appropriate it in discharge of the secured obligation. This institute has, however, been limited to the transfer of title to movables alone and although it extends to both tangible and intangible movables (such as debts and other rights), immovable property cannot be subject to transfer by way of security.

7.2.6 Security over Ships and Aircraft

Maritime special privileges and special privileges on aircraft arise by operation of law and attach with priority to a ship or aircraft. Moreover, ship and aircraft mortgages exist as distinct types of security because of the influence of English law on Malta's legal system. These are self-contained forms of security, regulated by special laws on merchant shipping (the Merchant Shipping Act, Chapter 234 of the Laws of Malta) and aviation (the Aircraft Registration Act, Chapter 503 of the Laws of Malta) respectively. For more information in this respect please refer to Chapter 15.10 on 'Ship Mortgages' and Chapter 16.2 on 'Security over Aircraft'.

7.2.7 Possessory Right or Lien

Our law also recognises the "jus retentionis" or "right of retention" which is a form of security granted to persons in whose possession an asset has been placed for purposes of work or preservation. In the case of ships and aircraft, this "lien" is regulated in some detail.

7.3 Types of Personal Security: Guarantee and Suretyship

The typical type of "personal security" is the "guarantee". This security is not granted by the debtor himself but by a third party. Even a pledge as referred to above may be given by a third party. The Civil Code actually speaks of "suretyship" not "guarantee", although it appears that both are coterminous under our law. The Civil Code regulates the effects of a typical contract of suretyship. The guarantee, which must be in writing on pain of nullity, can be secured by means of real security or it may be unsecured.

The Civil Code also deals with the related concept of "joint and several liability". Interestingly, the Civil Code states that, when the benefit of an agreement is derived only by one of the co-debtors in a joint

and several obligation, then there is a suretyship regulated by this particular title of the Civil Code and not one of joint and several liability in the wide sense as regulated by the general provisions on obligations. The effect of this, barring contrary agreement between the parties, is to make the guarantor a subsidiary debtor and not a principal debtor, notwithstanding what is stated in the contract. This rule does not apply in commercial transactions as, in that case, all co-debtors and guarantors are deemed to be jointly and severally liable in all cases.

The provisions of the Civil Code on suretyship also state clearly that the surety is only bound to pay the creditor in the event of the default of the principal debtor whose property must first be discussed ("beneficium excussionis"). This rule does not apply if the surety has renounced to such benefit or has bound himself jointly and severally with the debtor. In fact, in commercial transactions, a surety is presumed to be bound jointly and severally with the debtor (absent an agreement to the contrary). In practice, in many transactions (e.g. banking, but not only), it is common to agree specifically that the guarantor is a joint and several debtor, or even a principal debtor, so as to make it clear that the liability is not subsidiary to the principal debt or subject to the normal rules in the Civil Code which assume the subsidiary nature of the suretyship.

A guarantor is subrogated to the debt of the creditor whom he has paid; however, if the guarantor has paid part of the debt due to the creditor, then, the creditor ranks ahead of the subrogated guarantor for the balance. In certain instances, a surety can seek indemnity against a principal debtor even before he has paid out any sums under the guarantee. A surety is released from liability if the creditor releases a security (hypothec, privilege or another surety) he may have and, in that manner, prejudices the guarantor's right to full subrogation.

In practice, particularly in banking transactions, it is common to have specific agreements making the guarantor a joint and several debtor, or even a principal debtor, so as to make it clear that the liability is not subsidiary to the principal debt or subject to the normal rules in the Civil Code which assume the subsidiary nature of the suretyship. When banks give guarantees on behalf of their clients, the agreements often go even further and make the liability of the bank totally independent of the debts of the debtor for which the guarantee had initially been raised. Given the structure of the Civil Code, these fall within the category of "atypical contracts" which, although not regulated by Malta's Code, are valid and effective, provided they do not conflict with public policy.

7.4 Other "Security"

7.4.1 Irrevocables Mandates

The Civil Code has always regulated mandate generally, yet more recently provisions on irrevocable mandate as a tool for enforcing security have been introduced. This latter concept of irrevocable mandate was, for a time, limitedly developed through judgements however, it was unclear whether such mandates could be used as security. This is now provided for statutorily through Act VIII of 2010. The general rule under Maltese law remains that mandate is of its nature revocable but this is now subject to exceptions. A mandate may not be revoked where it is made in writing and is expressly stated to be granted by way of security in favour of the mandatary or of any other person, and that it is irrevocable. In such case, it may only be revoked with the consent of the person whose interest is secured thereby. In addition, an irrevocable mandate by way of security is not terminated upon a declaration of bankruptcy as would be the case with an ordinary revocable mandate. It is not permissible, however, for an irrevocable mandate by way of security to be issued with reference to immovable property or rights therein.

7.4.2 Charges

Charges, whether floating or fixed do not exist under Maltese law. In a landmark judgement dealing with security, the court held that priority is an issue of procedure and, hence, regulated by the "lex fori", in this case Maltese law. The court also held that it was the proper law of the contract that determines whether the claim is substantively privileged (i.e. having a lien).

The term "charge" has no specific legal connotation under Maltese law. Its use, and the creation of a "charge" in a public deed or a private writing, will have no effect. The concept of "equity" is also alien to our law, and thus the distinction between equitable and legal charges is non-existent.

7.4.3 Security Trusts

In 2004 a new sub-title 'Of Security Trusts' was introduced in our Civil Code. Whereas by virtue of the Recognition of Trusts Act, 1994, Maltese law had long recognised foreign law trusts created by a written instrument, the concept of security trusts is now firmly embedded in Malta's Civil Code, as part of a wider project of introducing trusts law into Maltese domestic legislation.

As a result, “security” may now be created in favour of a trustee, for the benefit of any creditor/s, present or future, or in favour of a class or classes of creditors. For the purposes of such security trusts, security means any arrangement whereby the rights of a creditor are legally protected, including any undertaking, guarantee, mandate, pledge, assignment, transfer, grant, privilege or hypothec or the placing of property in possession or control of the trustee with rights of retention and sale as may be agreed.

CHAPTER 8: CORPORATE STRUCTURES FOR DOING BUSINESS

8.1 Introduction

Maltese company law is essentially regulated by the Companies Act, 1995 (Chapter 386 of the laws of Malta) (the "Companies Act") which replaced the earlier Commercial Partnerships Ordinance, 1962 (Chapter 168 of the laws of Malta) and adopted many aspects of the UK Companies Act, 1985 and the Insolvency Act, 1986. The Companies Act has been amended from time to time, to implement applicable EU Directives on company law as well as other developments in other sectors of Maltese law (e.g. securitisation). The Registry of Companies is the competent authority within the Malta Financial Services Authority (the "MFSA") which regulates all legal aspects of companies and their registration, maintenance, winding up and compliance with the provisions of the Companies Act (the "Registry of Companies").

8.2 The Limited Liability Company

8.2.1 Legal Personality

The most commonly used and by far most regulated corporate legal entity under our law is the limited liability company. A limited liability company can be either private or public; while private companies may be either exempt or non-exempt. Limited liability companies may also take the form of an investment company with variable share capital (SICAV) or an investment company with fixed share capital (INVCO). Apart from the limited liability company, whether public or private, the other commercial legal entities include:

- an unlimited partnership ("en non collectif);
- a partnership having both limited and unlimited partners, also called limited partnerships ("en commandite");
- a "public corporation" established with separate legal personality by virtue of a specific Act of Parliament (typically used by the Government for the purposes of conducting the activities of a public service utility or authority);
- Shipping Organisations;
- Trusts and Foundations;
- investment companies with variable share capital having objects limited to acting as investment companies;
- protected cell companies with objects limited to carrying on the business of insurance;
- incorporated cell companies with objects limited to carrying on the business of insurance; and
- recognised incorporated cell companies with objects limited to carrying on permitted investment services activities.

Other entities include:

- Overseas branches of a foreign company in Malta (branches do not have a legal personality separate and distinct from the foreign company of which they are a branch nor are such branches "re-incorporated in Malta);
- European Economic Interest Groupings (EEIG); and
- "*Societas Europaea* .

8.2.2 Registration Procedure

A company may be registered in Malta by the shareholders or their respective authorised attorney(s) appointed to carry out all the necessary formalities required by the Registry of Companies. There are no restrictions (other than general rules of legal capacity) as to who can subscribe to shares in a company. It is usual practice for a company to be registered through a local firm of lawyers or accountants.

The essential elements of the formation and registration process for a private company may for

general information purposes be condensed as follows:

- completing our Letter of Engagement, a Company Incorporation Questionnaire and other forms through which we will receive all relevant details and information about the company to be formed and its shareholders, director(s) and share capital, and providing us with the documents stated therein as being required (i) by the Registry of Companies for its own purposes and (ii) by us in satisfaction of our customer acceptance policies and our anti-money laundering due diligence protocols;
- applying with the Registry of Companies for a reservation of the name intended for the company;
- depositing share capital (in an amount corresponding to the paid up issued share capital) either in our share capitalisation account or in a foreign bank's company in-formation account (and drawing up and delivering an expert report for registration, if the consideration for the shares subscribed is non-cash);
- assessing whether the company's activities or objects necessitate licensing by government or other competent licensing authority in Malta (e.g. appropriate licences are required for banking, financial and investment services, gaming activities etc.);
- preparing a Memorandum and Articles of Association for signature by the shareholders;
- granting and executing Powers of Attorney in our favour if the Memorandum and Articles of Association will be signed by us as attorneys on behalf of the shareholders;
- filing and registering the Memorandum and Articles of Association with the Registry of Companies together with all required supporting documents and paying the company registration fee; and
- drafting and completing a stamp duty exemption application on the basis of the information provided in the Company Incorporation Questionnaire and submitting it to the Maltese tax authorities (if the company to be incorporated qualifies for such an exemption).

The registration fee payable to the Registry of Companies is calculated on the authorised share capital capped at a maximum of EUR 2,250. Furthermore, an annual fee is also payable to the Registry of Companies.

The following is a more detailed elaboration on the requirements and procedures to be satisfied and followed for a private limited liability company to be incorporated in Malta.

KYC and Anti-Money Laundering Protocols:

On an internal level, we conduct due diligence enquiries for client acceptance purposes in compliance with our "Know Your Client protocols and best practice in the industry. Apart from our standard engagement letter with the promoters wishing to form a Maltese company and the completion of a Company Incorporation Questionnaire, we would ordinarily request a number of other documents and information. This includes on several occasions a favourable bank reference. Furthermore, in the process of incorporating companies, it is necessary to comply with our Prevention of Money Laundering Regulations, 2003 (Subsidiary Legislation 373.01 of the laws of Malta) which transpose into Maltese domestic law the requirements of the EU anti-money laundering Directives, which are an integral part of our law. In essence, it is necessary to implement client identification procedures and by virtue of the relevant evidentiary documentation determine the ultimate beneficial ownership of relevant interests. We would usually be in a position to advise the exact documentation required in specific cases as soon as we are informed of client's concrete intentions in respect of the company incorporation. The processing of personal data is carried out by us in accordance with the Data Protection Act (Chapter 440 of the laws of Malta).

Reservation of Company Name:

It is possible to secure the reservation of the name of a prospective company or companies by application to the Registry of Companies. If the name is available and the application acceded to, the name is reserved for 3 months, renewable for further successive periods of 3 months upon written request.

Memorandum and Articles of Association:

The Memorandum and Articles of Association must be prepared for signature by the shareholders or their attorneys under a written power of attorney. The Companies Act provides regulations in the First Schedule to the Companies Act for the management of a limited liability company. If Articles of Association are not registered or if Articles of Association are registered, insofar as the Article of Association do not exclude or modify the said regulations contained in the First Schedule to the Act, such regulations constitute the regulations of the company in the same manner and to the same extent as if they were contained in duly

registered Articles of Association. A company is deemed to have been registered and incorporated for all purposes and effects of law when the Registry of Companies issues a Certificate of Registration in respect of that company.

Shareholders:

A company must always have Ordinary shares. A company is either formed as a single-member private exempt company having one shareholder or as a normal private limited liability company composed of at least 2 shareholders (even if one will hold only one share while the other will hold the balance, e.g. Shareholder A holding 1,999 shares and Shareholder B holding 1 share). In this respect, the following documents need to be submitted to the Registry of Companies:

(i) if any of the shareholders is an individual, a copy of the Passport of the shareholder showing clearly the image of the holder and his personal details, certified as a true copy by a notary public, lawyer or reputable bank; the Passport must have a valid expiry date;

(ii) if any of the shareholders is a body corporate, one or more of the following documents: (a) a certified copy of its Certificate of Incorporation, (b) an original recent Good-standing Certificate (unless the body corporate has been incorporated only recently), (c) an official copy of its constitutive documents (with English translation, where applicable); and/or (d) a structure chart certified as true and accurate by one of the shareholder's officers, copies must be certified as true by a notary public, lawyer or reputable bank;

(iii) if any of the shareholders is a body corporate established outside the EU or is a non-EU national, a favourable and original bank reference in respect of that shareholder (unless the shareholder holds less than 5% of the share capital in which case, the bank reference will not be required); if this cannot be obtained because the company is of recent formation or for any other reason, an original bank or professional reference in respect of the ultimate beneficial owner and a copy of his Passport showing clearly the image of the holder and his personal details, certified as a true copy by a notary public, lawyer or a bank; the Passport must have a valid expiry date.

Directors:

In the case of a private company, a company must have at least one director, who may, save in the case of an exempt company, may be an individual or a body corporate. In the case of exempt companies, it is not possible to have a corporate director.

In this respect, the following documents need to be submitted to the Registry of Companies:

(i) if any of the directors is an individual, a copy of the Passport of the director showing clearly the image of the holder and his personal details, certified as a true copy by a notary public, lawyer or reputable bank; the Passport must have a valid expiry date;

(ii) if any of the directors is a body corporate, one or more of the following documents:(a) a certified copy of its Certificate of Incorporation, (b) an original recent Good-standing Certificate (unless the body corporate has been incorporated only recently) and/or (c) an official copy of its constitutive documents (with English translation, where applicable); copies must be certified as true by a notary public, lawyer or reputable bank.

Company Secretary:

It is a legal requirement that a company appoints a Company Secretary who must be an individual (save for particular exceptions), whether a Maltese national or not. He cannot also be the sole director of the company (save for a private exempt company), but one of the directors may act as company secretary where the company has more than one director. A copy of his valid Passport showing clearly the image of the holder and his personal details, certified as a true copy by a notary public, lawyer or reputable bank is required to be submitted at the Registry of Companies.

As from 3 January 2018 it will also be possible for bodies corporate to be appointed as company secretaries as long as they are registered as Company Service Providers in terms of the Company Service Providers Act (Chapter 529 of the laws of Malta).

Initial Share Capital:

Evidence that the amount of the share capital has been deposited with a reputable bank either through the use of a share capitalisation account (when the initial share capital is of an amount which does not exceed 11,650) or by opening a company

in-formation bank account with a foreign bank must be produced to the Registry of Companies. As there is no legal requirement to have a bank account situate in Malta, we would usually recommend that - for share capitalisation and company incorporation purposes - such an account be opened directly with the client's own bankers in the name of the company to which the company share capital refers. The account must be opened in the same convertible currency in which the company share capital will be denominated and for not less than the minimum share capital allowed by our law (see above). It is also important to note that the company's financial statements must be prepared in the same currency denomination as the share capital. Care should be taken to ensure that the company name appearing on the bank's deposit advice tallies precisely with the name which will appear in the company's Memorandum and Articles of Association (but the company name appearing on the bank's deposit advice may be qualified by the designation "in formation" or "company in formation"). In practice, we find that it is often less complicated and time-consuming for the client to open a bank account with his bankers outside Malta than in Malta on account of the client's on-going relationship with his bank abroad.

If the consideration for the shares subscribed is "non-cash", an auditor's report has to be drawn up and delivered for registration to the Registry of Companies.

Powers of Attorney for Company Registration:

Powers of Attorney are often issued by subscribers to local attorneys in order to allow the latter to subscribe to the shares and sign the Memorandum and Articles of Association on behalf of the prospective shareholders of the company to be incorporated. An individual instrument must be completed, dated and executed in original by each subscriber and witnessed. If the shareholder is a body corporate, the name of the authorised director/s or representative/s acting on behalf of the body corporate should also be indicated clearly. The witness should also certify that the signatory is authorised to act for and bind the body corporate with his signature. The originals are required in Malta for company incorporation purposes and for retention with and archiving in the company's records.

Directors' Share Qualification:

In case the Memorandum and Articles of Association require the directors to have a share qualification, they either have to subscribe to the shares or undertake in writing to do so. This written undertaking must be submitted to the Registry of Companies.

Registration at the Registry of Companies:

The Memorandum and Articles of Association is filed and registered with the Registry of Companies together with the supporting documents (such as the Powers of Attorney and bank's deposit advice) and payment of the registration fees.

Official Company Registration Charges:

The fees for the registration of the company are calculated on the basis of the value of the authorised share capital. The minimum fee is of 245 and rises to a maximum of 2,250 on an authorised share capital in excess of 2,500,000.

Public Access to Company Documents:

Following the company's registration, the information set out in the Memorandum and Articles of Association (including the name, address and number of any official personal identification document, such as a Passport or ID Card, of the shareholders, director/s and company secretary) is available for perusal by the public at the Registry of Companies. This is also the case with the Powers of Attorney issued by the subscribers for the purpose of subscribing to the Memorandum and Articles of Association and the bank's deposit advice in respect of the company share capital.

8.2.3 Company Objects

The Memorandum of Association of a limited liability company must state the object(s) for which such company is being incorporated. The objects may not be simply stated to be any lawful purpose or trade in general. Specific objects must be stated. A company's corporate capacity is usually limited by its objects as stated in the relevant objects clause in its Memorandum of Association.

Single member companies must specify in the objects clause the activity which will constitute their main trading activity and the business of such companies must consist principally of that activity. Other objects may also be stipulated.

8.2.4 Power to Borrow

Unless otherwise provided by its Memorandum and Articles of Association, a company is empowered to borrow money, to charge its property as well as to issue any form of debentures.

8.2.5 Registered Ofice

A limited liability company's must have a registered office address in Malta. A company incorporated in Malta on or after 1st July, 1994 is deemed to be resident in Malta for all purposes and effects of law. Any change of the registered office in Malta may be effected by a resolution of the directors and a statutory Form Q must be registered with the Registry of Companies.

8.2.6 Shareholders of a Limited Liability Company

A private limited liability company is either formed by a sole shareholder if the company to be incorporated is to have the status of a single-member private exempt company, otherwise it needs to have at all times a minimum of 2 shareholders who may be either private individuals or bodies corporate or both. The Memorandum of Association must specify the name and residence or business address of each of the subscribers, while their names, identification document number and addresses are publicly available at the Registry of Companies. Private companies restrict the maximum number of shareholders that may subscribe to their shares to 50. There are usually other restrictions on the rights of members of private companies to transfer and register shares to non- members (e.g. shareholder pre-emption rights; rights of the Board to refuse the registration of a transfer).

Shares may also be held in a fiduciary capacity by appropriately established fiduciary or trustee companies duly licensed by the Malta Financial Services Authority ("MFSA"). A full list of the licensees is accessible from the MFSA website.

8.2.7 Share Capital

The Memorandum of Association of a company must state the total amount of the share capital and the nominal value of each share. A share is a numbered unit in the share capital of a company. It is deemed at law to be an item of movable property representing the property interest of its holder, having a fixed nominal value which is not necessarily the same as its market value. Shares ordinarily confer upon their holders rights to dividends, to the proceeds on a winding up, to vote at meetings as well as certain duties, such as, that of paying up any unpaid dues on the shares. The share capital of a company may be denominated in euro or in any other convertible currency. The currency of the share capital must be the company's reporting currency for accounting and tax purposes.

The authorised share capital of a company must be:

- not less than 46,587.47 subscribed by at least 2 persons in the case of a public company; not less than 25% of the nominal value of each share taken has to be paid up; or
- not less than 1,164.69 subscribed by at least 2 persons in the case of a private company (save in the case of a single-member company); 20% of the nominal value of each share has to be paid up;
- where the authorised share capital is equal to the minimum aforesaid, it has to be fully subscribed in the Memorandum of Association and where it exceeds such minimum, at least that minimum has to be subscribed in the Memorandum of Association.

The issued share capital of a company may be divided into different classes of shares, which usually have distinguishing descriptions and different rights may attach to each class. The Memorandum must set out clearly how the classes of shares are made up, how they are to be paid up and what rights attach thereto or not.

8.2.8 Redeemable Preference Shares

Every company must have "Ordinary shares that are not redeemable.

However, "Redeemable Preference Shares" may also be issued if authorised by the Memorandum or Articles of Association of the company and the terms of issue allow such shares to be redeemed. The procedure for the redemption of redeemable preference shares is regulated by the Companies Act. Essentially, the rule is that where a company issues preference shares which are to be redeemed or are liable to be redeemed at the option of the company or the shareholder, no shares can be redeemed except:

- out of the profits of the company which would otherwise be available for distribution; or
- out of the proceeds of a fresh issue of shares made for the purpose of the redemption.

Other conditions must also be satisfied as regards the issuance and the terms and manner of redemption of preference shares.

The redemption procedure set out in the Memorandum and Articles of Association of a particular company must be followed when redeeming preference shares. A Notice of Redemption of Preference Shares must be given to

the Registry of Companies by filing a statutory Form T(1) within 14 days from the date of the redemption for registration therewith (a penalty is chargeable on default).

Redeemed preference shares are treated as cancelled on redemption, and the amount of the company's issued share capital is reduced by the nominal value of those shares: provided that redemptions of preference shares are not to be taken as reducing the amount of the company's authorised share capital.

8.2.9 Reduction of Share Capital

A company's share capital may be reduced pursuant to an extraordinary resolution of the shareholders of the company authorising the reduction in the share capital. The notice convening the extraordinary general meeting must also specify the purpose of the reduction and the way in which it is to be carried out.

However, any reduction of a company's issued share capital cannot take effect until 3 months from the date of the official publication of a notice relating to the resolution effecting such alteration. This allows a company creditor whose debt existed prior to the publication of the notice to object by writ of summons filed within the said 3 months and satisfy the Court that, due to the proposed reduction in the issued share capital, the satisfaction of his claims would be prejudiced and that no adequate safeguards have been obtained from the company. The court may either uphold the objection or allow the reduction on sufficient security being given.

An alteration consisting in the reduction of the issued share capital whose purpose is to offset losses incurred or to include sums of money in a reserve takes effect immediately on the registration of the resolution concerning such a reduction and the provisions relating to the rights granted to creditors of the company do not apply, provided that:

(i) the amount of such reserve is, following this operation, not more than 10% of the reduced issued share capital; and

(ii) such reserve shall be used only for offsetting losses incurred or for increasing the issued share capital by the capitalisation of such reserve.

In the case of an alteration consisting in the reduction of the issued share capital whose purpose is to offset losses incurred or to include sums of money in a reserve, the amounts deriving from the reduction of the issued share capital may not be used for making payments or distributions to shareholders or to discharge shareholders from the obligation to pay calls on their shares.

If the provisions relating to the 3 month period and to the rights granted to the creditors of the company are followed for the purpose of reducing any sum of money contained in any such reserve (for offsetting losses incurred or for increasing the issued share capital by the capitalisation of such reserve), the amounts deriving there from may be used for making payments or distributions to shareholders.

8.2.10 Loan Capital

Unless otherwise provided by its Memorandum and Articles of Association, a company is empowered to borrow money, to charge its property, as well as to issue any form of debentures. Debentures may be:

- unsecured or secured;
- redeemable: repayable at a fixed date or upon demand or by periodic drawings;
- perpetual: repayable only in the event of a winding up of the company or a serious breach of the conditions of issue;
- registered;
- convertible: if the holder has the right to convert them at specified times into shares of the company;
- issued at a discount; and
- issued to a maximum of fifty debenture holders in the case of a single-member private exempt company.

8.2.11 Protection of Minority Rights

The Companies Act and other laws contain provisions which confer rights upon and protect minority shareholders. The type of protection afforded varies from individual membership rights under the Companies Act to qualified minority rights under the Companies Act or under a company's Memorandum and Articles of Association. The Companies Act also grants the right to any member of a company to make an application to the court for a remedial order if the affairs of the company have been or are being or are likely to be conducted in a manner that is oppressive, unfairly discriminatory against, or unfairly prejudicial, to any member of the company or in a manner that is contrary to the interests of the members as a whole. In addition, the Companies Act incorporates other provisions

designed to protect minority shareholders, including certain statutory restraints on directors and the right of shareholders to petition for a company's compulsory winding-up under the Companies Act.

8.2.12 Financial Assistance

It is not lawful for an undertaking to:

(i) subscribe for, hold, acquire or otherwise deal in shares in a company which is its parent company; or

(ii) give, whether directly or indirectly, and whether by means of a loan, guarantee, the provision of security or otherwise, any financial assistance for the purpose of an acquisition or subscription made or to be made by any person of or for any shares in the company or its parent company.

However, financial assistance may be provided if the company granting the financial assistance is a private company and certain requirements are fulfilled, namely:

(i) after taking into account the financial position of the company and the obligations of the directors under the Companies Act, the board of directors resolves by the affirmative vote of a majority of all the directors to authorise the grant of financial assistance for a specific transaction; and

(ii) an extraordinary resolution has been passed affirming the resolution taken as described above; and

(iii) a declaration in the prescribed form - signed by 2 directors (or by 1 director where the board of directors is composed of only 1 director) confirming that the requirements set out in the manner described above have been satisfied - is duly filed with the Registry of Companies prior to the granting of the financial assistance.

8.2.13 Pledges of Shares

The Companies Act regulates the pledging of securities in a company in considerable detail. The terms "securities" in this context includes shares, debentures and other similar instrument issued by a company. It provides that securities may be pledged by their holder in favour of any person as security for any obligation, unless the Memorandum or Articles of Association of the company, or the conditions of issue of such securities, provide otherwise. The pledge of securities must be done in writing.

During the existence of a pledge, any transfer or other assignment by the pledgor of the pledged securities is null and void, unless consented to by the pledgee in which case the securities transferred or assigned remain subject to the pledge. The Companies Act contains further provisions on the effects of the pledge on transfers of securities, dividends, voting, and capital deductions. In case of default under a pledge agreement, the pledgee is entitled either to dispose of the securities pledged in his favour or to appropriate and acquire the securities himself, in settlement of the debt due to him or part thereof, after agreement on the value of the securities. In the absence of agreement, court procedures determine the fair value. Where the pledgor defaults in fulfilling his obligations and the securities pledged are in a private company, then, they must first be offered to the other shareholders of the company before being submitted for sale to the public.

Notice of the pledge (and its termination) must be delivered in writing to the company and the Registry of Companies within 14 days from the grant (or termination) of the pledge. The pledge is effective with regard to third parties only after registration of the notice with the Registry of Companies. Notice requirements also exist in the case of a pledge of securities in a public company quoted on a Maltese regulated market.

8.2.14 Directors and Other Officers

The business of a company is managed by the directors who may exercise all the powers of the company except those reserved to the company in general meeting. The directors are named in the Memorandum of Association and are always subject to removal by the shareholders. A private company must have at least 1 director and a public company at least 2. Every company must have a company secretary. The latter must also be named in the Memorandum of Association and is subject to removal by the board of directors. There are no nationality or residence restrictions in either case. Nor is it necessary for a director to hold shares in a company.

Unless otherwise provided, the board of directors has the power to appoint a managing director and may delegate to the managing director or to any director any power exercisable by them.

The Memorandum of Association must specify the manner in which the representation of the company is to be exercised and the name of the person or

persons vested with the legal and judicial representation of the company.

The directors also have a number of important statutory duties, such as the maintenance of proper books of account in terms of the Companies Act, preparation of audited accounts and reports, the laying of the company's accounts before the Annual General Meeting, the preparation of the statutory Annual Returns and Income Tax and VAT Returns. Directors are also personally liable at law for the payment of the company's income tax and VAT. We are in a position to supply readers on request with a memorandum detailing the directors fiscal duties and liabilities.

8.2.15 Fiduciary Duties of Directors

The directors of a limited liability company are bound by certain statutory fiduciary and other duties and obligations in terms of the provisions of the Companies Act and particular provisions of the Civil Code. By definition, the term "director" includes any person occupying the position of director by whatever name called if he carries out substantially the same functions in relation to the direction of a company as those carried out by a director.

The general fiduciary duties of directors are defined in the Companies Act. Directors of companies (inter alia):

- are bound to act honestly and in good faith in the best interests of the company;
- must promote the well-being of the company;
- are responsible for the general governance of the company and its proper administration and management and the general supervision of its affairs;
- are expected to exercise the degree of care, diligence and skill which would be exercised by a reasonably diligent person;
- must not make secret or personal profits from their position nor make personal gain from confidential information of the company;
- must ensure that their personal interests do not conflict with the interests of the company;
- must not use any property, information or opportunity of the company for their own or anyone else's benefit, or misuse the powers granted to them.

The majority of the above-mentioned fiduciary duties also emanate from the provisions of the Civil Code which deal with 'Fiduciary Obligations.'

Directors also have specific duties, which include among others:

- the preparation of the financial statements of the company in accordance with the law, such as to give a true and fair view of the state of affairs of the company as at the end of each financial period and of the profit or loss for that period;
- keeping proper accounting records which disclose with reasonable accuracy at any time the financial position of the company enabling them to ensure that the financial statements comply with the Companies Act;
- the preparation of the directors' report;
- the preparation and filing of the income tax return by the due date and paying the tax (if any) due to the Commissioner of Inland Revenue by the tax settlement date;
- the preparation and filing of VAT Returns and paying the tax due (if any) to the VAT Department by the due date;
- the appointment of the first auditors of the company;
- ensuring that a copy of the audited financial statements, duly signed in
- original by the directors and the auditor, are registered with the Registry of Companies each year;
- the preparation, execution and registration of the statutory Annual Return as well as any other
- statutory forms or notices with the Registry of Companies;
- the appointment of a suitable company secretary;
- the laying of accounts before the general meeting and ensuring that such general meeting is duly convened and held in terms of the Memorandum and Articles of Association;
- the making of a declaration of solvency when dissolution is proposed; directors are liable for any misrepresentation;
- in certain cases, the making of a request for the appointment of a liquidator;
- the convening of a creditors' meeting for winding-up;

- the presentation of certain documents to creditors in a creditors winding-up;
- safe-guarding the assets of the company and taking reasonable steps for the prevention and detection of fraud and other irregularities.

As a general rule, directors are personally liable for damages in case of any breach of their duties. Their responsibility is joint and several. Directors may also face criminal responsibility for 'company law crimes' relating to dissolution and winding up.

Furthermore, and very importantly, the directors of a company are personally liable for the payment of income tax and any additional tax and interest due by the company in accordance with the Income Tax Act, (Chapter 123 of the laws of Malta) and the Income Tax Management Act, (Chapter 372 of laws of Malta).

The Commissioner of Inland Revenue is entitled to enforce his claim for the payment of the tax by way of an executive title against the company and may also proceed with its enforcement against every principal officer (including a director) of the company.

Company directors are also personally liable for any failure to pay any VAT due by the company to the VAT Department.

8.2.16 Auditors

An auditor is an individual holding a practising certificate or warrant entitling him to practise in the field of auditing in terms of the Accountancy Profession Act, (Chapter 281 of the laws of Malta) or a firm of auditors duly registered thereunder. A company in an annual general meeting may appoint an auditor who may hold office until the conclusion of the next annual general meeting. A general meeting is required to re-appoint the current auditor or change the auditor. The company also decides the remuneration of the auditor. The first auditor of the company is appointed by the directors before the first annual general meeting at which the accounts are laid. In the latter case, his remuneration is fixed by the directors.

The auditor's main duty is to make a report to the members of the company on the accounts examined by him and on every balance sheet and profit and loss account laid before the company in general meeting during his tenure of office. The auditor's report has to be drawn up in accordance with generally accepted accounting principles and practices as defined in the Accountancy Profession Act, or any regulations issued thereunder.

Company accounts must be audited by a Maltese certified auditor. However, it is important to note that it is the responsibility of the company's directors - not of the auditors - to maintain accounting records and financial statements. The auditor has a right of access at all times to the company's accounting records and other documentation and is entitled to require information and any explanations as may be necessary to perform his duties, as well as all notices and other communications relating to any general meeting which a member of the company is entitled to receive. He also has the right to attend any general meeting of the company and be heard on any part of the business of the meeting that concerns them as auditors.

8.2.17 Annual Returns, General Meetings and Accounts

A statutory form of Annual Return containing details of the shareholders, share capital, shareholding, directors, company secretary, registered office and certain other corporate details must be registered with the Registry of Companies on an annual basis on each anniversary of the company's registration and incorporation and made up to the date of such anniversary.

Every company must have an annual general meeting and must also prepare annual accounts audited by a Maltese certified public accountant and auditor, which accounts must be laid before the company in general meeting for approval (after having been duly signed in accordance with the Companies Act) together with a signed directors' report and eventually submitted to the Registry of Companies.

The time allowed for the submission of accounts before the general meeting is 10 months after the end of the relevant accounting reference period for private companies and 7 months after the end of the relevant accounting reference period for public companies. Alterations or additions to the Memorandum and Articles of Association (such as inter alia changes in the company name and changes in capital) are effected by extraordinary resolution of the company in general meeting. Although there is no provision in the Companies Act prohibiting general meetings being held via telephone link or video conference, it is advisable that the Articles of Association specifically make provision for this.

8.2.18 Accounting Reference Date

If a company does not expressly establish its accounting reference date by means of the filing of the relevant statutory Form R specifying a date in

the calendar year as being its accounting reference date with the Registry of Companies within 9 months from the date of its registration and incorporation, then, the 31st December of each year is taken by default to be the accounting reference date.

8.2.19 Public Offerings

A public offering requires the registration of a prospectus stating the matters specified in Part A of the Second Schedule to the Companies Act and include the reports specified in Part II of Part B the said Second Schedule. Only public companies may offer their shares to the public.

In 2005, Malta transposed the provisions of Directive 2003/71/EC of the European Parliament and of the Council of the 4th November, 2003 on the prospectus to be published when securities are offered to the public or admitted to trading (the "Prospectus Directive"). These rules underwent a major revision in 2010 with the adoption of the amending Directive 2010/73/EU, which directive was also transposed into Maltese law. The central competent administrative authority within the meaning of the Prospectus Directive is the MFSA acting through the Registry of Companies.

In terms of the Prospectus Directive, the Maltese law requirements for the drawing-up, scrutiny and distribution of the prospectus when securities are offered to the public or admitted to trading are largely equivalent to those of the other member states of the EU. In addition, once approved by the MFSA, a prospectus must be accepted everywhere else in the EU and the European Economic Area (EEA) through the single passport mechanism.

8.2.20 Corporate Governance

A "Code of Principles of Good Corporate Governance" (the "Code") was published in November, 2001 and approved by the Council of the Malta Stock Exchange for adoption by companies whose securities are quoted on the Official List or the Alternative Companies List of the Malta Stock Exchange. The Code does not apply to Collective Investment Schemes.

The Code is incorporated in and forms an integral part of the Listing Rules drawn up by the Listing Authority in accordance with the provisions of the Financial Markets Act, (Chapter 345 of the Laws of Malta).

As a result of experience gained and in line with EU Recommendations and the guidelines laid down by the Organisation for Economic Cooperation and Development, the Code was completely revised in 2006.

The Code is not legally binding and accordingly, whenever an inconsistency exists between the Code and a company law provision, the latter will prevail.

As such, companies to whom the Code applies are urged by the Code to adopt the principles outlined therein "so as to provide proper incentives for the board and management to pursue objectives that are in the interests of the Company and its shareholders".

The directors of a listed company are required by the Code to include in their Annual Report a statement of compliance providing an explanation of the extent to which they have adopted the said principles. They are also to include in their Annual Report the effective measures they have taken to ensure compliance with the said principles throughout the accounting period. The auditors of such companies are also bound to include a report in the Annual Report on the statement of compliance and the report to shareholders made by the company and the board of directors of the company respectively.

In 2006, the MFSA also introduced a set of "Corporate Governance Guidelines for Public Interest Companies". These companies should act in the "communal interest" besides acting in the interests of their shareholders. These Guidelines are also not mandatory and the board of directors and auditors are not required to make a declaration of compliance. Nevertheless, public interest companies are urged to adopt the Guidelines and to highlight their adherence to such Guidelines in their annual reports.

In 2013 the MFSA further published a "Corporate Governance Manual for Directors of Investment Companies and Collective Investment Schemes." This Manual was subsequently revised in September 2014. The purpose of this Manual is to provide guidance to directors on how to implement good governance practices and the MFSA encourages directors to use the Manual to develop sound corporate governance practices for the companies for which they act.

8.2.21 Register of Beneficial Owners

Following publication of the Companies Act (Register of Beneficial Owners) Regulations, 2017 (the "RBO Regulations") on the 20th December 2017, Maltese companies will be required, as described below, to identify and maintain a register of their ultimate beneficial owners as well as to provide information on their beneficial owners to the Malta Registry of Companies which will be keeping its own beneficial owners register.

By beneficial owners, the RBO Regulations refer to any natural persons having direct or indirect ownership of 25% plus 1 or more of the shares or more than 25% of the voting rights or other ownership interests of the company.

With effect from 1st January 2018, companies seeking to be registered or re-domiciled in Malta must submit, along with the Memorandum and Articles of Association of the Company, a statutory form to be signed by at least two of the company's proposed directors (unless the company is to have only one director) identifying the particulars of each ultimate beneficial owner of the company and clearly indicating the nature and extent of the beneficial interest held by each ultimate beneficial owner. A similar statutory form will also need to be submitted by all companies seeking to register any change in shareholding occurring through a transfer, transmission, increase, or reduction of shares or other restructuring of share capital or changes of voting rights which form will, indicate whether the change in question has brought about any change in ultimate beneficial ownership of the company. Any changes in the beneficial ownership of a company, even if they do not result in any of the above-mentioned notifiable changes, must also be notified to the Malta Registry of Companies within 14 days of the recording of the change with the Company.

On top of these notification requirements, as mentioned earlier above, all companies will now be required to keep their own internal register of beneficial owners. While this requirement applies as from 1st January 2018 to any new companies registered on or after that date, existing companies have been allowed a 6-month grace period, expiring on 30th June 2018, within which they are to comply with their obligation of maintaining their own beneficial owners register and to thereafter also make their first registry of companies filing. The latter becomes due either when a change in beneficial ownership is first recorded by the company after the 30th June 2018 or, if no change occurs, a first obligatory filing which will be triggered on the next anniversary of the company's incorporation which occurs after the 30th June 2018.

The regime applies to all commercial partnerships, including limited liability companies, with the exception of companies listed on a regulated market and companies the direct shareholders of which are all natural persons.

Failure to abide by the obligations in the RBO Regulations may attract joint and several liability of the Company and its officers, and in certain case also its shareholders and beneficial owners, for lump sum penalties for default coupled with daily penalties for so long as the default continues.

It is worth noting that the Registry of Companies will be maintaining its own register of beneficial owners which will be accessible as from the 1st April 2018 limitedly by the persons indicated in the RBO Regulations. It is mainly accessible by relevant competent authorities and persons subject to obligations relating to the prevention, combating and detection of money laundering and combating of financing of terrorism but third person will also be able to request access in writing provided that they are able to show a legitimate interest in the information they seek to access.

8.3 Continutation of Companies

The continuation, migration or re-domiciliation of companies into Malta is regulated by the Continuation of Companies Regulations, 2002 (as subsequently amended most recently in 2007) (as amended, the "Continuation Regulations") each made in terms of the Companies Act. The Continuation Regulations govern both the continuation in Malta of a foreign body corporate as well as the continuation of a Maltese company in another country or jurisdiction outside Malta.

The advantages of re-domiciling into Malta from a foreign jurisdiction include:

- access to Malta's double tax treaty network;
- access to Malta's tax refund system; and
- access to Malta's participation exemption régime.

8.3.1 Preliminary Requirements

In essence, the preliminary requirements for a continuation into Malta are the following:

(i) the foreign entity to be continued into Malta must be a body corporate;

(ii) the foreign country must be an "approved country or jurisdiction";

(iii) the law of the foreign country must permit continuation;

(iv) the foreign entity's Memorandum and Articles of Association or constitutive documents must permit the continuation into another jurisdiction.

According to current policy, the Registry of Companies no longer maintains a list of approved

jurisdictions but accepts any country or jurisdiction insofar as it is not black-listed by the FATF and its laws permit continuation. Thus, a company formed in any jurisdiction may re-domicile to Malta from its country of incorporation at any time after incorporation as long as the relevant documentary requirements are satisfied. However, if the company re-domiciles to another jurisdiction after incorporation and then seeks to continue into Malta, the Companies Registry will not allow the re-domiciliation to occur, except after the lapse of one year from incorporation (and this in order to discourage "jurisdiction shopping). Likewise, if following incorporation, the company re-domiciles to several jurisdictions successively, the Registry of Companies will only allow the re-domiciliation into Malta if the aggregate time spent in these jurisdictions (including the one of incorporation) exceeds 12 months.

We also require to receive our "Letter of Engagement (Company Continuation)" and a completed Company Incorporation Questionnaire containing all relevant details about the company to be re-domiciled and providing the documents needed (i) by the Registry of Companies in compliance with the documentary requirements set out in the Continuation Regulations and (ii) for the purpose of our customer acceptance and anti-money laundering protocols.

8.3.2 Other Provisions

The Continuation Regulations contain detailed provisions regarding the various documents that need to be prepared and submitted to the Registry of Companies (including inter alia evidence of corporate action or other corporate authorisations, consents, company shareholder and creditor notifications, solvency declarations and legal opinions) as well as specific provisions regulating companies requiring a licence under Maltese law, public companies, authorised foreign trustees and fiduciaries, pledges of shares and the continuation of Investment Funds into Malta.

8.3.3 Companies requiring a Licence under Maltese Law

If the Foreign Entity carries on any activities which are licensable in Malta (including banking, investment services, insurance, stock-broking, and acting as a nominee (fiduciary or mandatary) or trustee to hold shares in Maltese companies), and the said activities are also licensable in the Foreign Country of incorporation, then, it must provide evidence of the consent of the competent authorities of that Foreign Country to the continuation of the Foreign Entity in Malta (to be translated into English if the original is not in that language). If the Foreign Entity is not licensable in the Foreign Country but its activities would be licensable in Malta, then a licence must be obtained in Malta before it can commence operations.

8.3.4 Public Companies

If the Foreign Entity is a public company which has offered its shares or debentures to the public, then, the most recent prospectus as nearly equivalent to the requirements of the Act will be required.

If the Foreign Entity is quoted on a recognised stock-exchange (being a stock-exchange recognised by the relevant competent authorities of the jurisdiction in which the Foreign Entity has been incorporated), evidence must be produced to the Registry of Companies that the continuation has been authorised by the relevant competent authorities of that stock-exchange (to be translated into English if the original is not in that language).

Evidence of the current membership of the Foreign Entity or the method and form of recording such membership, duly authenticated, must also be produced to the satisfaction of the Registry of Companies.

8.3.5 Provisional and Final Registration

The Registry of Companies issues an original Provisional Certificate of Continuation when he is satisfied that the documents submitted to him comply with the Regulations and after his having provisionally registered the said documents.

At that point, the company is deemed provisionally registered under the Act.

In practice, a copy certified by the Registry of Companies of the Provisional Certificate of Continuation is then submitted to the Registrar of Companies (or equivalent competent authority) of the Foreign Country in which the Foreign Entity had been incorporated or registered in order to serve as notice of the fact that the Foreign Entity has now been (provisionally) registered as continuing in Malta as a Maltese company; such submission would be accompanied by a request to have the Foreign Entity struck off the register of the Foreign Country. The Registry of Companies requires that the original Provisional Certificate of Continuation be retained in Malta; this is in order to allow the original Provisional Certificate of Continuation to be surrendered to the Registry of Companies together with the Foreign Entity's certificate of cessation or discontinuation issued by the Registrar of Companies (or equivalent competent authority) of the Foreign Country in which the Foreign Entity had been incorporated or registered.

Once evidence is provided to the Registry of Companies within 6 months from the issuance of a Provisional Certificate of Continuation (extendable for good cause for another 3 months) that the Foreign Entity has ceased to be registered in the Foreign Country (by means of an original certificate of cessation or discontinuation), the Registry of Companies issues a Certificate of Continuation confirming that the Foreign Entity has been registered as continuing in Malta; as noted above, the Provisional Certificate of Continuation must first be surrendered to the Registry of Companies.

If evidence is not provided within the aforesaid time limits, the Registry of Companies may proceed to strike the name of the company (provisionally) registered as continuing in Malta off the register and inform the relevant competent authority of the Foreign Country where the Foreign Entity had originally been incorporated that the company is not registered in Malta.

8.3.6 Effects of Registration

With effect from the date of the Provisional Certificate of Continuation issued by the Registry of Companies, the company now registered as continued in Malta:

(i) continues to be a body corporate registered under the Act and is deemed provisionally registered in Malta for all purposes of law; and

(ii) is subject to all the obligations and capable of exercising all of the powers of a company registered under the Act.

Its constitutive documents (revised as aforesaid) are deemed to be the Memorandum and Articles of Association of the company.

However, the registration of a Foreign Entity as a company continued in Malta in terms of the Regulations does not operate to:

(i) create a new legal entity; or

(ii) prejudice or affect the continuity of the company; or affect the property of the company; such company retaining all its assets, rights liabilities and obligations; or

(iii) render defective any legal or other proceedings instituted or to be instituted by or against the company; or

(iv) release or impair any conviction, judgement, ruling, order, debt, liability or obligation due or to become due or any cause existing against the company or against any member, director, officer or persons vested with the administration or the representation of the company.

Requests for the registration of a Foreign Entity as a company continued in Malta are not acceded to if:

(i) the dissolution or winding up of the Foreign Entity has commenced or insolvency proceedings, arrangements, compositions, recovery proceedings or any other analogous proceedings have been commenced by or against the Foreign Entity; or

(ii) a liquidator or special administrator of the Foreign Entity or a receiver of its property has been appointed; or

(iii) there is any scheme or order in relation thereto whereby the rights of creditors are suspended or restricted; or

(iv) any proceedings for breach of the laws of the country or jurisdiction of incorporation have been commenced against such Foreign Entity, not being proceedings arising out of an event which on the date of the occurrence thereof did not constitute such a breach.

The effects of provisional registration, therefore, arise immediately upon the issuance of the Provisional Certificate of Continuation and there is no difference at law between the effects of a provisional registration and a definitive one.

It is advisable in all cases to determine in advance of commencing the continuation process the outcome of the Foreign Entity's continuation insofar as concerns (i) the register of the Foreign Country of incorporation (i.e. certain measures may need to be taken under the law of the Foreign Country of incorporation to have the Foreign Entity discontinued in that jurisdiction); and (ii) the effect at law of the continuation of the Foreign Entity on any rights, liabilities or assets of the Foreign Entity (e.g. as far as concerns immovable property in terms of the "lex situs).

8.3.7 Existing Pledges of Shares

Where the shares of the Foreign Entity are pledged by written instrument in the Foreign Country, the Regulations provide that the pledge can be maintained in full force and effect by virtue of the registration (at no cost) in Malta of the statutory

Form of Notice of a Pledge of Securities (Form T(2)) within 14 (running) days of the issuance of the Provisional Certificate of Registration in Malta. Such pledges continue to be regulated by the law chosen by the parties and any jurisdiction or arbitration clauses remain in force.

8.4 Cross Border Mergers

Re-structuring by means of a Cross-Border Merger is an ideal way to move a corporate group's assets and liabilities from one jurisdiction to another.

By virtue of the transposition of the European Community Directive 2005/56/EC on cross-border mergers of limited liability companies, it is possible for Maltese public and private companies to be involved in a cross-border merger involving companies registered in EU or EEA Member States. This restructuring method is an ideal way to move a corporate group's assets and liabilities from one jurisdiction to another without having to enter into liquidation proceedings for the purposes of dissolving the company whose assets and liabilities are being transferred.

Due to the inherent cross-border nature of these transactions, some level of interaction between the different Registrars is to be expected. Such interaction has now been facilitated even further through the introduction of the EU's Business Registers Interconnection System (BRIS).

The cross-border merger process is very similar to that of a domestic merger and includes measures aimed at protecting the interests of minority shareholders, employees and creditors of the Maltese company involved in the cross-border merger. In the case of certain cross-border mergers by acquisition, simplified formalities may be applied which at times may shorten the cross-border merger process.

Unlike a domestic merger, a pre-merger certificate would be issued by the Registrars of each Member State involved in the merger before a final certificate of cross-border merger is issued by the Registrar of the Member State where the company resulting from the cross-border merger is registered. In practice attention also needs to be given to certain formalities which may be peculiar to certain jurisdictions. Ultimately, however, the end result is the same as that of a domestic merger: the acquisition of the assets and liabilities of the company/ies ceasing to exist by the acquiring company and, in the cases of a merger by acquisition and a merger by formation, the issue of shares by the acquiring company to the shareholders of the company/ies ceasing to exist.

8.5 Partnerships

8.5.1 Partnerships 'en nom collectif'

The principal characteristic of the partnership "en nom collectif is the unlimited and joint and several liability of all the partners for all the obligations of the partnership with all their property, present and future, and not merely up to the amount of their contribution to the partnership. It may be formed by 2 or more partners; operate under a partnership name and has its obligations guaranteed by the unlimited and joint and several liability of all the partners. The individual partners cannot however be sued before the property of the partnership is first discussed. As between the partners, each partner is liable for the debts of the partnership in the proportion fixed in the deed of partnership and, in default, by law. The partner who has wholly discharged a debt of the partnership may claim from the other partners the share due by each of them.

The official government fees to set up a partnership are the same as those applicable to limited liability companies but costs depend on the value of the contribution. A characteristic of partnerships which has made them attractive to small and medium-sized entrepreneurs is that partnerships do not have to file accounts or Annual Returns with the Registry of Companies.

8.5.2 Partnerships 'en commandite'

A partnership "en commandite operates under a partnership name; its obligations are guaranteed by the unlimited and joint and several liability of one or more partners, called the general partners, and by the liability limited to the amount, if any, unpaid on the contribution of one or more partners, called the limited partners. There has to be at least one general partner and one limited partner. The liability of the general partners is of a subsidiary nature in the sense that no action may be taken against them unless the property of the partnership is first discussed. The provisions governing partnerships "en nom collectif apply to this kind of partnership unless inconsistent with the provisions relating to partnerships "en commandite .

There are two types of partnerships "en commandite :

- An ordinary partnership with the contribution of the partners indicated by their proportion of interest; and
- A partnership with the contribution of the partners divided into shares. The provisions relating to shares in respect of a limited liability company are applicable insofar as they are not inconsistent with the provisions relating to the partnerships "en commandite .

8.5.3 Civil Partnerships

It is possible for two or more persons to create a partnership under our Civil Code, (Chapter 16 of the laws of Malta). The partners are not jointly and severally liable for the debts of the partnership and one of the partners cannot bind the others, unless they have given him power to that effect. The object of the partnership must be lawful and in the common interest of the parties. It is not lawful to set up a general partnership of all the property of the partners. There is no registry of civil partnerships and in this respect no deed has to be registered at the Registry of Companies, nor are there any disclosure requirements.

A partnership may be either:

- a general partnership of profits: such partnership includes all that which the parties acquire by their skill during the partnership, and the use of the movable or immovable property intended for the exercise of the trade or profession of the partner possessing such property; or
- a particular partnership: this type of partnership may have as its object certain specified things or the exercise of some trade or profession.

8.5.4 Assocations 'en participation'

The Companies Act makes provision for associations "en participation which are contracts constituted in writing whereby a person assigns to another for valuable consideration a portion of the profits and losses of a business or of one or more commercial transactions. The liability of the associate is limited to his contribution while the association itself does not have a legal personality distinct from its members.

8.6 European Economic Interest Groupings (EEIGs)

In certain aspects EEIGs are similar to partnerships. No initial capital is required for them to be formed.

EEIGs in Malta are regulated by the Companies Act (European Economic Interest Grouping) Regulations, 2003 which implement Council Regulation of the European Community on the European Economic Interest Grouping (EC Regulation 2137/85). EEIGs were introduced on a European level in order to facilitate co-operation among natural persons, companies, firms and other bodies across European borders. An EEIG may be formed by groups or associations consisting of not less than two and not more than twenty persons for the purposes of facilitating or developing the economic activities of its members, or to improve or increase the profits or benefits of such activities.The objects of an EEIG must relate solely to the economic activities of its members and to ancillary activities thereto. Membership of an EEIG is open to legal entities and to natural persons as long as these have a connection to at least two different European Member States, for example, via their place of registration or the place where their activities are carried out.

In certain aspects EEIGs are similar to partnerships. No initial capital is required for them to be formed. Upon registration EEIGs obtain a separate legal personality, distinct from that of its members. Members of an EEIG do not have limited liability since the EEIG's obligations are guaranteed by the unlimited and joint and several liability of its members. However, the EEIG's creditors would only be able to turn to the members once the EEIG's property has been discussed.

A key benefit of an EEIG is the possibility of transferring its official address to another Member State without the need of being wound up or creating a new EEIG in the receiving Member State. The transfer would become effective upon the lapse of two months from the publication of a transfer proposal which would have been unanimously approved by the EEIG's members. Upon the transfer becoming effective, the EEIG would become subject to the national laws of the receiving Member State.

8.7 Societas Europaea

Since our firm's involvement in the registration of the first SE in Malta in 2011, we have seen a growing interest in this corporate structure.

SE Regulation provides added flexibility to those public companies situated in European Member States whose national laws do not permit companies to re-domicile to another jurisdiction.

Where business is carried out on a European scale, one could opt to form a European Company (the Societas Europaea ("SE") in accordance with Council Regulation Council Regulation (EC) No. 2157/2001 of 8 October 2001 on the Statute for a European company as supplemented by Council Directive 2001/86/EC of 8 October 2001 with regard to the involvement of employees (the "SE Regulation").

The SE is a public limited liability company that has a distinct and separate legal personality from that of its members. Subject to prior satisfaction of a number of requirements, a SE may be established in four ways:

(i) by means of a merger between two public companies situated in different Member States;

(ii) through the creation of a holding company;

(iii) through the creation of a subsidiary or;

(iv) by way of a conversion of a public limited liability company into a SE.

The SE Regulation is directly applicable in Malta. SEs having their registered office in Malta would be governed by the SE Regulation. The SE Regulation only regulates specific matters relating to an SE, namely: its formation, board structures, general meeting, the preparation of annual accounts and consolidated accounts, winding up, liquidation, insolvency and cessation of payments, conversion into a public company and the transfer of an SE's registered office. If a matter is not dealt with in the SE Regulation then reference needs to be made to the Maltese law provisions applicable to public limited liability companies and the SE's statutes.

Since our firm's involvement in the registration of the first SE in Malta in 2011, we have seen a growing interest in this corporate structure. In particular, the SE Regulation provides added flexibility to those public companies situated in European Member States whose national laws do not permit companies to re-domicile to another jurisdiction without entering into liquidation. The transfer process as regulated by the SE Regulation, enables the SE to transfer its registered office to another European Member State with due regard being given to the interests of minority shareholders, creditors and employees.

8.8 Oversea Companies Establishing a Branch or Place of Business in Malta

8.8.1 Branch Office in Malta

Specific provisions apply under the Companies Act to foreign (non-Maltese) companies which establish a branch or place of business in Malta. The term "companies" applies to all bodies corporate, whatever their type, constituted or incorporated outside Malta and the Act refers to them generally as "oversea companies".

A foreign company can set up a branch in Malta by establishing a place of business in Malta. The Malta branch does not acquire separate legal personality from its foreign counterpart. It is not "re-incorporated in Malta and the criterion for its establishment in Malta depends on having a place of business in Malta. The registration fees payable to the Registry of Companies for setting up a branch are applicable to the registration of new companies.

8.8.2 Registration of Branch

To the extent that an oversea company actually establishes a place of business in Malta, the law obliges the oversea company to register with the Registry of Companies the relevant documents and prescribed statutory forms within one (1) month from establishment in Malta. In essence, it would be necessary to have an address at which the place of business is effectively established and also a person resident in Malta in respect of the activities of the branch or place of business established in Malta; the extent of the latter's authority must also be disclosed.

8.8.3 Subsequent Alterations

If any subsequent alteration is made in:

(i) the Memorandum and Articles of Association or constitutive documents, charter or statute of an oversea company; or

(ii) the director/s or company secretary or the persons vested with the administration or the representation of an oversea company, or in the particulars specified above under paragraph 3.7.2 hereof; or

(iii) the names or addresses of the individuals authorised to represent the oversea company;

the oversea company must within one month of any such alteration, deliver to the Registry of Companies for registration a return containing the particulars of the alteration, signed by a director, the company secretary or other authorised officer of the company.

8.8.4 Obligation to Keep Accounts

It is necessary at law for the oversea company:

- to annually deliver to the Registry of Companies for registration a balance sheet, profit and loss account and notes to the accounts prepared in such form, and containing such particulars and including such documents as under the provisions of the Companies Act the directors would – if the company had been a company formed and registered under the Companies Act – be required to make out and lay before the company in general meeting: provided that the Registry of Companies may accept for registration a balance sheet, profit and loss account and the notes to the accounts prepared in the form required under the law of the place of the oversea company's constitution or incorporation if, in his opinion or if as prescribed, such accounts give substantially the same information as, or greater information than, that required to be given by companies formed and registered in Malta; and
- in the event that the information is not substantially as much or the same as that required by Maltese law, the Registry of Companies may accept such accounts in their then current form, as long as the said accounts are also accompanied by a profit and loss account, a statement of assets in Malta and charges thereon and notes to the accounts (made out as nearly as may be in the form and containing the particulars required by law for companies formed and registered in Malta) concerning only such of the oversea company's operations, profits or losses in Malta and assets as may be situate in Malta as if the branch were a separate company registered in Malta; and an auditor's report thereon; special rules apply to the form and content of such financial statements; in short, the Registry of Companies has the discretion to accept accounts prepared overseas and also require that separate accounts be kept for the Malta operations of the branch;
- to keep the usual trade books for the branch operations and transactions in Malta; and
- to keep such records concerning taxable supplies, exemptions, deductions and transaction generally as required in terms of applicable VAT legislation for the purpose of the branch inter alia drawing up and delivering returns and payments to the VAT authorities in Malta.

8.9 Trusts

Maltese law is essentially a civil law system, with a Civil Code based on Roman Law and on the Code Napoleon. As a result of 164 years of British rule, the legal system was supplemented by a large number of statutes derived from English law. Although common law is not part of Maltese law, Maltese public law is based on English law and, in case of any lacunae in our public law, reference is made to English law. The same occurs in the case of private international law where the English common law is directly applied as the law of Malta, except where law or judicial trends consistently adopt different conflicts of laws principles or, as in the case of succession law, where this has been superseded by EU instruments. The incorporation of statutes based on English law has continued until today, especially in commercial law, although in recent years and especially following Malta's 2004 EU accession, EU legislation now has a much greater influence.

Notwithstanding the strong British presence in Malta for so many years, trust law and equity relating to trusts were never absorbed or statutorily incorporated into Maltese Law and trusts were only very rarely mentioned in legislation until 1988, when an Offshore Trusts Act was enacted in 1988 as part of the launching of Malta, back in the days, as an "offshore centre". Since the mid-1990s Malta has ceased to be an offshore centre, setting itself up,

instead, as an international financial centre that fully complies with EU laws.

8.9.1 Background

8.9.1.1 Judicial Approach in Malta

Although in the past the Courts in Malta have sometimes had to deal with trusts and trustees involving property located in Malta, this could hardly be considered to be a reflection of a consistent Maltese judicial approach at the time. One can only state that initially there was a broadly neutral approach to trusts. The Courts have treated trusts as being subject to the normal rules of interpretation and subjected them to the same tests for establishing the validity of legal acts in the context of unlawful "causa" (or consideration). In one case, the Court applied the special legal effects of the transfer of ownership arising from trusts established by a foreign bankruptcy court and in another case refused to interfere with the discretionary powers of a trustee under a discretionary trust. More recently, and since the incorporation of the trust into Maltese Civil law, although internal decisions relating to trusts are confidential and proceedings are held behind closed doors, experience has shown that the Maltese Courts have fully embraced the trust institute, giving it the full recognition and treatment it deserves as a legal institute in its own right, that forms an integral part of the Maltese Civil law.

While up to a few years ago trusts were essentially alien to the Maltese civil law system, the gradual phasing in of trusts legislation over the past decade or so into our domestic legal regime has stimulated significant interest in academic legal circles and has interestingly become the subject of several masters and doctoral theses in the Faculty of Laws of the University of Malta. This bears testimony to the increased local academic interest in the study of the law on trusts.

8.9.1.2 The Offshore Trusts Act, 1988

The source of the Maltese substantive law on trusts is the Trusts (Jersey) Law, 1984 that, in 1988, was adopted almost intact by the House of Representatives in Malta as a model for its Offshore Trusts Act, 1988 (the "OTA"). In so doing, however, the House ring-fenced the law to non-residents as it perceived trusts to be a legal institute neither accordant with nor beneficial to the Maltese community, but, instead, a "product" to be offered to non-residents: in other words, the trust was envisaged as part of the "offshore" project.

The OTA - brought into force in June 1989 - provided both for the creation of Maltese trusts as well as the recognition of foreign trusts. The legal framework provided by the OTA did not introduce the trust fully into the domestic legal framework (as it remained unavailable to Maltese residents), but recognised the institute of trust developed in common law jurisdictions for international activities.

The OTA recognised and enforced only Maltese offshore trusts where the settlor and the beneficiaries were non-residents and the trust property did not include immovable property in Malta nor shares, stocks and debentures of a company registered in Malta. Under the OTA, most types of trusts were recognised, including fixed, discretionary, charitable, constructive as well as accumulation and maintenance trusts, the duration of which was set at 100 years (except in the case of a trust with a charitable purpose, where this time limit did not apply). Apart from providing a definition for the first time of what constituted a trust under Maltese law, and of highlighting the specific functions, duties and rights of the settlor, the trustee and the beneficiaries in a trust relationship, perhaps the most important aspect of the introduction of the offshore trust in Malta was the number of benefits and exemptions that came with it. These included tax and duty benefits, asset protection and anonymity, synonymous with offshore activity in those days.

Admittedly, the OTA was not much of a success. By 1994, with the introduction of the Investment Services Act (Chapter 370 of the laws of Malta), and later in 2000 (as a result of international reviews of the Maltese legal system), the fact that the OTA did not apply internally was causing a series of difficulties. This notwithstanding, the OTA was a good statement of trust law, it remained the basis of Maltese trust law in the future and it also laid the foundations for the eventual incorporation in 2004 of the trust into the Maltese Civil Code and its availability on the domestic plane to Maltese residents.

8.9.1.3 The 1994 Amendments

After a few years of conducting "offshore" financial operations, Malta began curtailing the benefits of offshore legislation with several new laws limiting the tax advantages obtaining until then. In fact, even before the release of the OECD 2000 Progress Report in June 2000, Malta was listed as an "offshore jurisdiction" committed to co-operate with the OECD in addressing harmful tax practices. These developments were deemed necessary in order to bring Malta's fiscal system into line with the degree of responsibility required for EU membership as well as to avoid sanctions by industrial countries and the abrogation of double tax treaties. Furthermore, the Financial Action Task Force ("FATF") had for many years required financial institutions to obtain and record information on the identity of their clients, including

persons beneficially owning or controlling accounts or funds. In view of these international developments, in 1994 Malta sought to remedy the prevailing situation by means of a new package of legislation, which included, among others, the amendment of the Offshore Trusts Act, 1988 (which was re-named the Recognition of Trusts Act, Chapter 331 of the laws of Malta).

While these amendments eliminated most offshore activities (in fact, the term "offshore" was also omitted from the title and body of the law), the revised legislation modifying activities in Malta included company continuation provisions in Malta's company law aimed at encouraging the migration of trustees with trusts already established in other jurisdictions.

Furthermore, these amendments allowed the name by which the trust was to be known and registered to be changed at any time if this was in accordance with the terms of the trust. The protective trust was also introduced and the terms of the trust could make the interest of a beneficiary (i) liable to termination; (ii) subject to restriction on alienation or dealing; and (iii) subject to diminution or termination in the event of the beneficiary becoming bankrupt or insolvent, or any of his property becoming liable to seizure for the benefit of his creditors. These amendments also gave the beneficiary an automatic right to be provided with an accurate copy of accounts (a right that was elaborated upon and refined following later amendments in 2004).

The office of protector was also created by virtue of these amendments.

Another important principle which was introduced in Maltese trust law was that of tracing of property, so that property could be followed where this had been alienated or dealt with in breach of trust, unless it was in the hands of a bona fide purchaser for value without notice of the breach of trust.

8.9.1.4 The Recognition of Trusts Act, 1994

Amendments made to Jersey law were also replicated in 1994 with the enactment of the Recognition of Trusts Act (Chapter 374 of the laws of Malta, hereinafter referred to as the "RTA"). The amendments were prompted not only by the number of limitations arising out of the law, but also because of the strategy adopted at the time by the Government of Malta for the phasing out of offshore structures and placing Malta on the world map as an international financial centre for banking, insurance, trusts, investment services and funds.

The RTA was enacted so as to enable Malta to ratify the Convention on the Law Applicable to Trusts and on their Recognition adopted at the Hague Conference on Private International Law on the 20th October 1984 and operative on the 1st January 1992 (the "Convention") and to give full effect to it in Malta. The Convention came into force in Malta on the 1st March 1996. The Convention recognises the impracticability of civil law regimes adapting their legal concepts or changing their domestic law to deal with the status and powers of trustees, the nature of the interests of beneficiaries in the trust property and the status of settlors, trustees and beneficiaries. The Convention specifies the law applicable to trusts and also governs their recognition. Many provisions of the Convention were given the force of law in Malta by the RTA thereby making it necessary, at the time, to read the RTA in conjunction with the Convention.

The Convention applies only to those trusts which are created voluntarily and evidenced in writing. Consequently, trusts arising by operation of the law (constructive and resulting trusts) were excluded from the scope of the Convention. This was due to the fact that, in the latter case, the concept of trust is a mere fiction which is used to explain a remedy for accounting for or transferring property and that, therefore, trusts which are used as a remedial device and do not involve the fiduciary management of funds fall out of the scope of the Convention.

Under the Convention, once a trust is created, it has to be recognised. The so called recognition of a trust concerns the fact that the trust has to be given, in principle, all those effects which a foreign law governing the trust attaches to it. Some of these include the principles that the trust property constitutes a separate fund, that the trustee may sue and be sued in his capacity as trustee or that he may appear or act in such official capacity before a notary or any other person.

The provisions of the Convention may, unless otherwise provided for, be disregarded when their application would be manifestly incompatible with public policy in Malta and in matters having an effect on the interpretation or application of the law of Malta relating to fiscal matters.

In practice, the main impact of the Convention was that it opened the doors for the free use of trusts within the internal market. If foreign law trusts and their effects became recognised, the possibility of using trusts when needed and appropriate became obvious as a consequence, even when all the elements except the proper law were local. Indeed, since 1995 many foreign trusts have been used in purely domestic circumstances. The same situation happened in Italy (where the Italian Courts have

fully accepted the concept of "trusts interni") and one expects that the same will be replicated in other Civil Law countries adopting the Convention. There are of course concomitant problems with this: the intellectual weakness of using a foreign law in local structures (albeit enforceable); the weakness of the judicial system in having to apply a foreign law when faced with a problem; and the lack of qualifications by local professionals in the foreign law, thereby raising the costs of legal services. This notwithstanding, foreign law trusts continued to be used in Malta, even in internal structures.

8.9.1.5 The Trusts (Amendment) Act. 2004

In 2004, the Trusts (Amendment) Act 2004 was enacted in Malta in order to fulfil various goals:

(i) it sought to respect Malta's international commitments to the OECD and the FATF by eliminating the "*nominee company*" as a tool within the Maltese legal system, thus discarding the last remaining elements of ring-fencing and related discriminatory rules and abolishing certain rules on confidentiality;

(ii) it formally completed the process started in 1994 of re-directing Malta away from an "*offshore*" towards an "*onshore*" financial centre; banking, financial, insurance and investment services laws had all already been aligned with EU norms in 1994 and now trust law was able to catch up, dropping off all its "*offshore*" features in the meantime;

(iii) it sought to introduce rules of law which would make Malta an attractive location for the administration of trusts – both Maltese law trusts as well as foreign law trusts;

(iv) it addressed in detail the taxation of trusts that had until then been sparsely regulated; and

(v) it introduced a detailed regulatory framework for trustees and fiduciary activities.

This legislative project was probably the most significant development in Maltese Trust Law. The Trusts (Amendment) Act 2004 extensively amended the Recognition of Trusts Act (Chapter 331 of the laws of Malta), which latter enactment is now called the Trusts and Trustees Act (Chapter 331 of the laws of Malta, hereinafter referred to as the "TTA"), thereby reflecting the fact that one of its principal objects is also to regulate trustees. The TTA came into force on 1st January 2005. Several consequential amendments to several other laws were made, the most important being to the Civil Code which, for the first time, now contains several articles on the legal nature of trusts, trust transactions and particular uses and effects of trusts. There were also amendments to 18 other laws including the Income Tax Act, the Income Tax Management Act, the Companies Act and the Arbitration Act. The TTA also abrogated the RTA. All these amendments sought to achieve one or more of the above goals.

The Trusts (Amendment) Act, 2004 was a very important law with extensive implications. It was of great importance to the development of fiduciary relationships in Malta and also of considerable historical relevance as it effectively introduced trusts into the civil law of Malta, making trusts available to the maximum extent possible on the domestic plane, including in purely domestic situations. What this Trusts (Amendment) Act, 2004 recognised is the fact that the common law trust is not necessarily alien to civil law countries and thereby successfully enabled Maltese residents to also make use of trusts rather than restricting trusts to non-residents as the OTA had done.

8.9.2 The Trusts and Trustees (Amendment) Act, 2014

The most recent amendments to Maltese trust law came about by virtue of Act XI of 2014, entitled the Trusts and Trustees (Amendment) Act, 2014, following a 5-year review process of the TTA which was initiated by the Malta Financial Services Authority (the "MFSA").

The amendments sought to bring Maltese trust law in line with the laws of other trust jurisdictions. The most salient amendments included:

- the extension of the maximum period for which a trust can continue in existence to 125 years from 100 years;
- the formal recognition of a non-exhaustive list of settler-reserved powers including the right of the settlor to reserve in his favour a beneficial interest in trust property, the power to appoint, add or remove trustees, protectors or beneficiaries and the power to appoint an investment advisor or manager;
- the duty of trustees to avoid conflicts of interest;
- the removal of the 30-year prescriptive period for certain actions against trustees;
- the introduction of provisions regarding the setting up of Private Trust Companies (called trustees of family trusts);

- making authorisation a requirement for trustees who reside in or operating from Malta and providing clarity in the regulation of trustees.

8.9.3 Other Recent Developments

One of the latest developments in the area of Maltese trust law has been the enactment of the Trust and Trustees (Protected Disability Trusts) Regulations (Subsidiary Legislation 331.08 of the laws of Malta). The purpose of these regulations is to regulate the setting up and administration of trusts where the beneficiaries include at least 1 person that is a person with disability. These include regulations on who can act as trustee of such trusts, for whose benefit such trusts can be set up, the fees that can be charged and the mandatory requirement of the appointment of a protector. The regulations impose additional obligations on trustees including the notification to the MFSA of Protected Disability Trusts and also lay down investment parameters.

Ancillary provisions providing for tax and duty exemptions in the context of disability trusts and foundations have also been introduced in the Income Tax Act and the Duty on Documents and Transfers Act (Chapter 364 of the laws of Malta).

Malta has also, in 2017 enacted the Family Business Act (Chapter 565 of the laws of Malta) with the aim, as stated in the Act itself, of encouraging the regulation of family businesses, their governance and the transfer of the family business from one generation to the next. This Act also seeks to encourage and assist family businesses to enhance their internal organisation and structure with the aim of effectively operating the business and working towards a successful succession of the family business.

The Family Business Act introduced very specific provisions catering for the sensitivities and vulnerabilities of these kinds of businesses which show a marked trend of unwinding by the third generation in the family. The law addresses the issue of governance and transfers within the family so as to ensure these businesses continue to survive given how important they are for the local economy. The law proposes to cater for a series of incentives of a financial and fiscal nature but also goes into some detail in ensuring education and advisory support as well as dispute resolution mechanisms to support transfers of interests in these kinds of structures.

It is also possible for family businesses based outside Malta to register under the Family Business Act in order to qualify for the incentives reserved by Maltese law for family businesses. This has the potential of making Malta a very attractive jurisdiction for the restructuring of family businesses wherever the operations may be located. Interestingly this legislation is not limited to limited liability structures but encompasses unincorporated firms, holding structures like trusts and foundations and informal partnerships often found in families. The Maltese law provisions on the re-domiciliation of legal organisations may be a very useful tool for relocating foreign family companies to Malta in order to enjoy the benefits that this law grants.

8.9.4 Maltese Trusts: A Species of Fiduciary Obligation

8.9.4.1 The Introduction of Trusts into Maltese Law

Trust law in Malta is predominantly found in the TTA. The roadmap for the teaching and learning of trusts is set out in the Maltese Civil Code which classifies trusts as one of the sources of fiduciary obligations. Article 1124A of the Civil Code states that:

"(1) Fiduciary obligations arise in virtue of law, contract, quasi-contract, trusts, assumption of office or behaviour whenever a person (the "fiduciary"):

(a) owes a duty to protect the interests of another person; or

(b) holds, exercises control or powers of disposition over property for the benefit of other persons, including when he is vested with ownership of such property for such purpose; or

(c) receives information from another person subject to a duty of confidentiality and such person is aware or ought, in the circumstances, reasonably to have been aware, that the use of such information is intended to be restricted…".

It is therefore imperative to the understanding of what trusts are and how they are regulated to start by considering fiduciary obligations. Trusts share in common with all fiduciary obligations some basic fundamental elements. Trusts are specifically regulated by special provisions of the Civil Code and by the special and detailed law that the TTA is, but, at a basic level, trusts share important features with other institutes. As the above-quoted Article 1124A(1) states, the other institutes are contract (such as mandate or deposit), quasi-contract (such as unjustified enrichment or "negotiorum gestio"), office (such as directorships in companies) apart from law (such as statutory trusts) or behaviour. All

these give rise to fiduciary obligations and each have particular effects that are outlined in general terms in Articles 1124A and 1124B of the Civil Code.

Although trusts share common characteristics with other institutes, each institute is distinct under Maltese law and so one cannot freely apply specific rules of one institute to the other. Under Maltese law, the remedies of the particular institute will emerge from the special law relating to that institute. If the use of the institute in a particular case gives rise to fiduciary obligations (and that may or may not happen, and so the Court will have to analyse each case on its own merits), the rules in Articles 1124A and 1124B will apply and the additional or extended remedies in those articles will also be available. The relationship does not thereby automatically become one of trust and one does not therefore need to drag the law of trusts in to provide the additional remedies, as these remedies today arise from the fiduciary relationship itself. The end result is that under Maltese law each institute remains conceptually distinct and this is consistent with the premise that a trust only exists when the parties intend a trust to arise (or where the law specifically provides, as in the case of constructive trusts). If the parties intend something else (e.g. mandate), no trust will arise and therefore it would be illogical to apply trust remedies to a breach of mandate. What will happen under Maltese law is that if the breach of mandate amounts, in the particular case, to a breach of the fiduciary obligations undertaken and forming part of the mandate, then the remedies in the Civil Code for breach of mandate will be supplemented with the remedies for breach of fiduciary obligations. The Courts therefore have at their disposal broad powers to grant adequate remedies for such breaches. Prior to this amendment to the Civil Code, the available remedies were not entirely adequate and the Court was restricted in its powers.

To avoid any confusion on this point, the Maltese legislator paid particular attention to oral trusts because of the difficulty they present in determining precisely what the parties intended i.e. whether they intended to create a trust or a different legal or contractual relationship. As a result, article 7(2) of the TTA states that:

"(2) Without prejudice to the generality of sub-article (1), a trust may come into existence unilaterally or otherwise by oral declaration, or by an instrument in writing including by a will, by operation of law or by a judicial decision;

Provided that where assets are held, acquired or received by a person for another on the basis of oral arrangements of a fiduciary nature, express or implied, there shall be presumed to be a mandate regulated by Title XVIII of Book Second of the Civil Code, Chapter 16 or a deposit regulated by Title XIX of Book Second of the Civil Code, Chapter 16 as the case may be, unless there is evidence of an intention to create an oral trust."

8.9.4.2 Distinguishing Trusts from Other Institutes

It is very important to distinguish Maltese trusts from other civil law institutes that may have certain similar effects, although the fact that various institutes do indeed have similar effects does not mean that they are one and the same.

(i) Distinct Fund: The trust property constitutes a fund of assets which is separate and distinct from the personal property of the trustee and the property held under other trusts. This effect is important as it insulates the trust property from claims against the trustee which are unrelated to the trust in question.

(ii) Fiduciary Obligations: Trusts give rise to fiduciary obligations.

(iii) Administration of Assets and Income: A trustee administers assets and income for the benefit of beneficiaries and that makes a trustee similar to any other administrator except that the trustee becomes the legal owner of the property.

(iv) Enforceable Obligations against Trustee in favour of the Beneficiary: Trustees are bound by certain obligations as soon as they accept the office of trustee. There is a trust deed or terms of trust (to which the trustee is not necessarily an initial party, such as in the case of a testamentary trust) and the trustee is bound by enforceable obligations towards the beneficiaries (who are not parties to the trust deed but nonetheless have the trust administered for their benefit).

(v) Remedies: Trusts give rise to certain types of remedies that one does not usually find in ordinary cases, so as to ensure that the remedy is appropriate to the particular case.

8.9.4.3 Distinctive Features of a Maltese Trust Relationship

Essentially, under Maltese law:

(i) A trust involves the transfer of property to the trustee which creates a distinct patrimony or a distinct fund in relation to

such property. Such fund is immune from claims by the personal creditors or spouse of the trustee, does not form part of the patrimonial property of the trustee and is not inherited by the heirs of a trustee. Similar concepts exist under Maltese law in the case of the acceptance of an estate with the benefit of inventory, the holding and administration by a parent of assets belonging to a minor, the holding of assets by a custodian or a portfolio manager and others. A distinct patrimony is an *universitas rerum*: sometimes it is given legal personality (such as in the case of a foundation or a company) while in other cases the personality of the holder of the assets is used to achieve the legal ability to perform contractual acts in relation thereto.

(ii) A trust creates fiduciary obligations upon the trustee. As explained above, fiduciary obligations are known to Maltese law and are also found to arise from contractual arrangements as in mandate or deposit or from assumption of office (such is the case of company directors or administrators of foundations).

(iii) Fiduciary obligations arise in favour of the beneficiaries who are not necessarily a party to the original grant or settlement. While this also happens in the case of onerous donations under Maltese law, the extent to which beneficiary rights are enforceable far exceeds the strictures of a donee as contemplated by the Civil Code. Indeed, beneficiaries can be unnamed, can form part of a class, can be successive, can enjoy very different and varying rights and need not even be borne at the point in time when the trust is created. The Courts protect beneficiaries to a very large extent and the rights of beneficiaries to information are quite extensive and are considered to be of paramount importance.

(iv) The trustee is bound to administer the property with due care. These are similar to the duties of any administrator (such as tutors and curators, directors and mandataries) except that the trustee is the owner of the property and, subject to the terms of the trust, enjoys absolute rights including the power to sell and substitute property or to distribute it to the beneficiaries.

(v) The rights of beneficiaries in relation to the trust fund can vary from receiving income, receiving an annuity, receiving distributions of capital, use of assets, distribution of assets, being supported by loans or guarantees or any combination of these as may be permitted by the trust instrument. Although comparable institutes in civil law (such as usufruct, easements, leases, loans, annuities and others) could possibly fulfil specific aims appropriate for each institute, combining the various possibilities together raises difficulties in the case of the civil law institutes: not for trusts, however.

Essentially one can say that with a Maltese trust one can achieve anything in terms of beneficiary benefit that one can achieve with a traditional Anglo-Saxon trust.

While certain civil law institutes can – and do – replicate several individual effects of a trust, difficulties arise when one seeks to achieve a combination of such effects and to do so with the inherent flexibility that a trust is able to afford.

8.9.5 The Regulation of Trustees

8.9.5.1 Professional Trustees, Private Trustees and Private Trust Companies

The TTA distinguishes between professional and private trustees and has recently also made provision for Private Trust Companies ("PTCs") (which the relevant rules refer to as trustees of family trusts); all regulated by the MFSA.

A professional trustee is a person who receives property upon trusts or accepts to act as a trustee or co-trustee of a trust and who:

(i) either receives or is entitled to remuneration for acting as a trustee, or

(ii) acts as a trustee on a regular and habitual basis, or

(iii) holds himself out to be a trustee.

A professional trustee may be either an individual, resident or operating in or from Malta, or a corporate trustee, either registered in Malta or operating in Malta.

In terms of the TTA, an individual may act as a private trustee if he is either:

(i) related to the settlor by consanguinity or affinity in the direct line up to any degree

or in the collateral line up to the 4th degree, or

(ii) if he has known the settlor for at least 10 years.

In both cases, a private trustee cannot be remunerated, cannot hold himself out as a trustee to the public and cannot act habitually as trustee (meaning that he cannot act as trustee to more than 5 settlors at any time).

Furthermore, following ACT XI of 2014, the TTA now recognises trustees of a family trust (set up as a company), or PTCs, which must:

- have as its objects and activities limited to acting as trustee in relation to a specific settlor or settlors;
- not hold itself out to the public as acting as a trustee;
- not act habitually as a trustee (and in any case in relation to not more than 5 settlors at a time).

Furthermore, the TTA requires that the trust is one which is created to hold property for the future needs of family members or family dependants who are defined as an "individual who is related to the settlor or to any one of the settlors setting up the trust, by consanguinity, adoption or affinity, in the direct line up to any degree, whether ascendant or descendant, or in the collateral line up to the fifth degree inclusively."

Individual private trustees do not need authorisation to act as trustee but are bound to follow a strict notarial procedure laid down in the law. In fact, the TTA provides that a private trustee may only act as such if he satisfies certain conditions (for example, a private testamentary trustee must make an inventory of all trust assets within 6 months of accepting office, while in the case of an inter vivos trust, the private trustee must ensure that the trust is created by a notarial trust deed). The private trustee must also render in writing records of meetings with beneficiaries, advisors or protectors, the exercise of discretion in appointing or removing a beneficiary, and in reducing, distributing or advancing trust property. These records must be delivered to a depositary notary appointed in accordance with the provisions of the TTA.

In the case of PTCs, the TTA actually specifies that these do not require authorisation but are only required to apply for registration by the MFSA on the register of trustees of family trusts. The aim of these provisions is to facilitate the authorisation procedure in the context of family trusts, in view of the fact that they are typically designed around the needs of a specific family and in any case trustees would not be offering their services to the general public.

The registration process is regulated in terms of the Rules for Trustees of Family Trusts (issued by the MFSA on the 29th April 2016, in terms of the TTA) which lay down requisites for the application process (which include the requirement to have 3 individual directors all of whom must be deemed by the MFSA to be fit and proper persons and at least 1 of whom must possess knowledge and experience in the area of trusts; the requirement to take out insurance cover and the appointment of a Money Laundering Reporting Officer), the ongoing obligations post-registration (including the annual submission of a certificate of compliance) and also the surrender or cancellation of registration.

On the other hand, professional trustees, whether they are resident or operating in or from Malta, must obtain authorisation from the MFSA irrespective of the proper law of the trusts they are administering and whether or not all or part of the trust property is in Malta. Authorisation will only be granted as long as certain conditions are satisfied. These include the applicant being a company whose objects must include acting as trustee and carrying on activities ancillary or incidental thereto, and whose actual activities must be compatible and connected with the services of a trustee; the company must also have a Board of Directors composed of at least 3 individuals of good repute and possessing experience and qualifications in financial, fiduciary, accounting or legal services and whom the MFSA considers to be fit and proper to carry out the duties of a trustee; furthermore a minimum amount of capital must be retained (depending on whether the trustee is a body corporate or an individual) as a capital adequacy requirement; and they must maintain insurance cover which is proportionate to the nature and size of the trustee's business operations.

In order for a person to be considered as fit and proper, the MFSA assesses that person's competence and soundness of judgement:

(i) in assessing whether a person is competent, the MFSA considers whether a person has had similar responsibilities, his record in fulfilling them and whether that person has appropriate qualifications and training;

(ii) in assessing a person's soundness of judgement, the MFSA looks at the person's previous conduct and decision-taking.

Another condition for the MFSA to grant authorisation is that an applicant company must have adequate systems for maintaining proper records of the identity and residence of beneficiaries, of the dealings and the assets of the trusts to be administered and of compliance with applicable law. Furthermore, the name of the company must not be inconsistent with its trustee activity and, where the company is not registered in Malta, it must be constituted or incorporated in what the MFSA considers to be an approved jurisdiction.

Where the applicant seeking authorisation to act as a professional trustee is an individual, the MFSA must be satisfied that such individual is resident or operating in or from Malta and is a person of good repute, possessing experience and qualifications in financial, fiduciary, accounting or legal services and whom the MFSA considers to be fit and proper to act as trustee. Furthermore, such individual must have established adequate systems for maintaining proper records of the identity and residence of beneficiaries and of the dealings and assets of the trusts to be administered.

The authorisation granted by the MFSA to act as a professional trustee may be general or restricted to particular specified activities.

In order to avoid any regulatory loopholes, the definition of trustees has been extended to include mandataries holding property for another person and administrators or trustees of private foundations or other non-charitable foundations. However, certain exemptions exist for specific categories of persons and specific types of trusts from the requirement of obtaining authorisation to act as a trustee. Thus, for instance, licensed banks, investment firms or insurance companies licensed to hold clients' monies or assets are not required to obtain authorisation as long as they act as trustee in the ordinary course of the business for which they are licensed. Likewise, due to their specific nature, certain types of transactions in which a trust is used are exempt from requiring authorisation in terms of the TTA, such as in the case of:

- trustees of trusts created for the purpose of holding security in the form of hypothecs, pledges, assignments or mandates;
- trustees of any movable property held as security and for the benefit of persons whose entitlement is conditional or determinable in terms of the trust;
- liquidators, curators in bankruptcy or court appointed administrators;
- advocates, notaries public, legal procurators or certified public accountants, but only if acting as trustee is limited to what is necessary and incidental in the course of carrying out their profession;
- trustees of unit trusts;
- trustees of charitable trusts;
- co-trustees, as long as the other trustee is authorised in terms of the TTA;
- bodies corporate set up in approved jurisdictions and which are established solely for the purpose of holding trust property and ancillary acts;
- parties to a contract who agree to receive property as trustees in the context of the performance of such contracts;
- persons holding shares in Maltese- registered companies when such shares do not have any special voting rights and their nominal value does not exceed 1.

In other cases that would require authorisation, a fast-track notification method may be used to expedite applications by already regulated entities, instead of having to follow the usual application procedure. In fact, the TTA provides that a person licensed in terms of the Banking Act (Chapter 371 of the laws of Malta), or the Investment Services Act, or the Insurance Business Act (Chapter 403 of the laws of Malta) or a foreign person with an equivalent licence issued by the relevant regulatory authority in an approved jurisdiction, acting as trustee not in the course of the business for which they are licensed, must notify the MFSA in writing of their intention to act as trustee in Malta at least 45 days prior to commencing activities in Malta. This notification must outline the person's proposed activities in Malta and must be accompanied by such information as the MFSA may request from time to time. Also, the foreign applicant must obtain the prior consent of the relevant regulatory authority to provide trustee services in Malta. Furthermore, no activities may be commenced in Malta prior to the MFSA confirming that it has no objections. This notification procedure also applies to a person having a licence or authorisation to act as a trustee issued by the relevant regulatory authority in an approved jurisdiction. This enables a foreign licensed trustee from an approved jurisdiction to establish operations in a simplified and expeditious manner. This procedure also applies to a person registered under the Retirement Pensions Act (Chapter 514 of the laws of Malta) as a retirement scheme administrator.

Upon receipt of an application to obtain authorisation to act as a trustee, in deciding

whether to grant or refuse authorisation the TTA lays down that the MFSA must have regard to the protection of settlors and beneficiaries, the protection of the reputation of Malta and the promotion of competition and choice. The TTA also grants the MFSA the right to cancel or suspend an authorisation in certain circumstances such as when the holder of the authorisation is no longer deemed to be fit and proper to act as a trustee, or where it has been furnished with information which is false, inaccurate or misleading or in any other circumstances under which the MFSA would have been precluded from issuing an authorisation.

The TTA grants the MFSA extensive regulatory and investigative powers over trustees whether authorised or exempt from authorisation or those requiring registration. It has the right to request any person who is or appears to be acting as trustee, to furnish it with information and documentation in respect of its activities. The MFSA also has the power to give any person acting as trustee such directives as it may deem appropriate and any person to whom the notice is given must obey, comply with and give effect to such directive within the time and in the manner stated in the directive. Such directives may, for example, require that any person having functions of a trustee be removed or replaced by another person acceptable to the MFSA.

The TTA also empowers the MFSA to draw up a "Code of Conduct" to be followed by all trustees, whether requiring authorisation or not. The Code of Conduct currently in force came into effect in February 2005 and may be viewed on the MFSA's website (www.mfsa.com.mt, together with the relevant form of application for authorisation to act as trustees, the guidance notes in relation to this application form, the application form for PTCs and the rules applicable to PTCs).

The Code of Conduct stresses that a proper due diligence exercise must be carried out before a decision is made to act for any new customer. Trustees must therefore have policies and procedures in place that are adequate to ensure that they know the identity of each settlor and protector, on an ongoing basis, and to the fullest extent possible, the identity of the beneficiaries. They must also verify the source of all assets settled on trust in order to satisfy themselves that they are not of illicit origin.

This Code of Conduct has been under review and new Proposed Rules for Trustees and Other Fiduciaries (the "Proposed Rulebook"), issued by the MFSA in terms of the same powers given to it by the TTA, are currently being discussed by the MFSA following a draft that was issued for consultation. The scope of the Proposed Rulebook is to give greater legal certainty to the current Code of Conduct and, generally, for increased standardisation in the industry. It was considered that a body of rules would leave no room for doubt as to the nature of the obligations imposed. The Rules also aim to be more exhaustive and to effectively codify many of the good practice rules and policies that were developed over the years, besides also building on the experience gained over the more than 10 years since the Code of Conduct was published.

As the name itself suggests, many of the rules also apply to mandataries and to administrators of private foundations and the Proposed Rulebook has been drafted in a way to achieve clarity as to the respective applicability. The rules are split into different sections according to their applicability (that is those applying generally to persons authorised in terms of the TTA and those applying to specific authorised persons).

Whilst building on the existing principles found in the Code of Conduct, the Proposed Rulebook seeks to further regulate the operation of trustees both by elaborating on existing rules as well as by introducing new requirements such as, for instance, regulations on the provision of company services, the regulation of introducers, the office and role of the compliance officer, as well as a financial resources requirement and detailed regulation of the requirement of a professional indemnity insurance policy.

The Proposed Rulebook was circulated for consultation and representations were allowed to be made until 15th February 2017.

Trustees generally must also comply with the Prevention of Money Laundering Act (Chapter 373 of the laws of Malta) and the Prevention of Money Laundering and Funding of Terrorism Regulations (Subsidiary Legislation 373.01 of the laws of Malta).

8.9.5.2 Locating a Trust Business in Malta

Trustee and fiduciary services no doubt form part of a larger web of services which make up a financial centre. Trust law brings to a legal system an enhanced level of efficiency and flexibility and, because of the remedies it provides, provokes higher standards of accountability. These are the benefits Malta has achieved through the review of its trust law. The drafters of the law have been very careful to avoid doing anything that would possibly impinge on the freedom of operation of international trustees in Malta. The attraction of a business location is partly provided by a mix of incentives and the avoidance of disincentives or difficulties of a legal or practical nature. Having

joined the EU in 2004, Malta's ability to extend "incentives", especially of a fiscal nature, has been reduced and the creation of level playing fields has become the main focus. Having said that, Maltese legislation inherently presents a fiscally advantageous environment in which to operate, which explains why Malta has become the domicile of choice for various international operations using Malta as a base from where to conduct their operations, or for international structures to be located. The combination of the Parent-Subsidiary Directive and certain refund rules for shareholders based on the full imputation system of taxation that has been adopted in Malta for many years for the taxation of company profits in Malta, ensure that Malta does not tax income unnecessarily when it is more appropriate for the promoters to be taxed in their own jurisdiction. Malta has also concluded Double Taxation Treaties with a considerable number of countries to ensure that the same income is not taxed twice in cross-border situations (see Appendix D).

The existence of the Continuation of Companies Regulations (Subsidiary Legislation 386.05 of the laws of Malta) are also a very important incentive for existing trust businesses considering locating operations in Malta because it eliminates the need of transferring all the trust business to a new Maltese entity, with all the consequential complications that transferring all the trust assets from the existing trustee to the new trustee would entail. Assuming the operator wants a Maltese trust company (using a branch of a foreign company is always possible), continuance or re-domiciliation of a company means the trustee remains the same legal entity and merely changes its nationality: no assets need to be transferred and the trust remains fully intact. The trustee should naturally advise its client of its change in nationality but otherwise there is no change to the trust. It is not even strictly necessary for a Maltese trustee to operate under a Maltese law trust, and the trustee is free to hold property under foreign law trusts. Only companies in approved jurisdictions may be continued into Malta and the list excludes several of the non-European traditional tax havens, so this solution is only available in respect of existing trustees operating from companies offering the highest standards. It is possible to "jurisdiction hop" but the Maltese regulator has blocked this to some extent by demanding that a company must have been located in a jurisdiction for at least 1 year before continuing to Malta.

Setting up a branch of a foreign trust company in Malta is also a possibility, leaving its nationality and place of incorporation untouched. In this case, when the applicant is a person having a licence to act as a trustee issued by the relevant regulatory authority in an approved jurisdiction, such person may follow the fast-track procedure described earlier and obtain authorisation to operate in Malta by giving the MFSA 45 days notice of its intent. This "fast track" system allows foreign trustees the possibility of using their current regulatory status to simplify and expedite the process, eliminating the cost and effort involved in a full application. The notice must naturally provide all the required information and the MFSA may impose conditions or object but this is a very useful incentive to those who wish to set up in Malta.

There is also the possibility of setting up a subsidiary in Malta and applying for an authorisation for the subsidiary to act as a trustee.

Clearly, even in all these cases, the trusts governed by a foreign law will continue to be governed by their own law unaffected by the relocation of the trustee to Malta because Malta will seek to recognise trusts set up under foreign laws and will not seek to impose its domestic Trust law or Civil Law principles on such trusts.

Some may suggest that the introduction of trusts into a civil law jurisdiction could imply some conflict with local public policy. This is clearly not the case for Malta, as Maltese law fully recognises trusts as part of its domestic law and several provisions of law on trusts have been embedded in its Civil Code. In other words, the detailed regulation of Maltese Trust law will not impact on the foreign law trust and if the settlor has chosen a specific foreign law to regulate the trust for particular benefits or reasons he has identified, Maltese trust law will not upset his plans if the trustee relocates to Malta or sets up an operation here.

Furthermore, as the Convention has a "public policy" reservation, Maltese law has ensured that the typical public policy arguments in this sector, which usually emerge from the Civil Code, do not pose a problem to foreign trusts. In particular, Article 6(4) of the TTA states that the provisions prohibiting entails in wills and donations do not prohibit trusts while Article 6(5) of the TTA provides that the rules demanding that any post-death disposition be only made by will does not apply to trusts. Furthermore Article 6B of the TTA ensures that the application of any mandatory rules are applied in a way which preserves the trust relationship as much as possible. Finally the possible impact of the domestic rules on reserved portions (formerly referred to as legitim) on a trust has also been addressed in a rather radical manner, and, one might add, differently from the manner other systems have addressed it, by applying the personal law of the decujus to succession so that the Maltese rules on reserved portion will apply to a

disposition under trusts only if the settlor is domiciled in Malta at the time of the disposition, even when the property settled on trust consists of immovable property situated in Malta. With the advent of the EU Succession Regulation (Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012), the default habitual residence has naturally become the relevant connecting factor. In most cases of foreign law trusts administered by a trustee who commences operations in Malta, this will not be the case as settlors are most likely not to be habitually resident in Malta.

The outcome of these and other rules is that there is little or no danger of a settlement by a foreign domiciliary, especially from a common law country, governed by a foreign law, being negatively affected as a result of an international trust company transferring all or part of its trust operations to Malta.

It is sometimes remarked that a risk exists where the Courts of the trust jurisdiction do not have sufficient trust experience and may have difficulty in applying a foreign trust law should the need arise (in I World vs Vossberg (2004), a Maltese Court had no difficulty in denying an application for an injunction against the exercise of a discretion by the trustee under a discretionary trust governed by the law of Jersey). This notwithstanding, even this danger can be managed by introducing a jurisdiction or arbitration clause in the trust instrument. Article 8(2) of the TTA states that if there is a jurisdiction clause in a foreign law trust referring a matter to the Court of the foreign country the law of which is applicable, then, the Maltese Court must stay proceedings and refer the matter to the foreign Courts. The Maltese Courts may however issue interim orders for the protection of any interested party and they enjoy a discretion on the matter when the trust property is immovable property in Malta or the settlor or beneficiaries are domiciled in Malta.

As can be seen, much has been done to render the process of establishing an operation in Malta attractive and equally much has been done to eliminate legal risks which may arise from the relocation of trustees to Malta.

8.9.5.3 Taxation of Trusts

Where at least one of the trustees of a trust is a person resident in Malta, tax is normally payable by the trustee at the rate of 35% on any income and capital gains "attributable" to the trust.

However, Malta applies the transparency principle such that certain trust income or gains are deemed as "not attributable" to the trust and are considered to be derived directly by the beneficiaries of the trust. Transparency applies where:

(i) all the beneficiaries of the trust are either not ordinarily resident or not domiciled in Malta, and

(ii) all the trust income arises outside Malta (or is certain tax-exempt income in Malta).

Where the income is not attributable to the trust as indicated above, no Maltese tax is payable by the trustee or the beneficiaries of the trust.

More innovatively, a trust may also elect to be treated as a company ordinarily resident and domiciled in Malta for all purposes of tax law. When a trust makes such an election, all provisions in the Income Tax Acts applicable to Maltese companies would apply equally to the trust including the tax refunds applicable to the shareholders of a Maltese company. Accordingly, the beneficiaries of the trust would be registered for tax refunds in the same way as the shareholders of a Malta company would be registered. Any distributions made by the trustee to the beneficiaries of the trust would therefore be deemed to be a distribution of a dividend for the purposes of claiming tax refunds under the Income Tax Acts.

The Income Tax Acts contain various provisions which are intended to ensure that there is a "no better / no worse" result if one had to opt to set up a trust when compared to the result if the same transaction had to be structured without a trust.

Furthermore, the same principle is the guiding rationale behind the stamp duty provisions for trusts as contained in the Duty on Documents and Transfers Act. Stamp duty is normally payable on the transfer of dutiable assets to the trust, but duty is only payable on the increase in value at the time of a distribution to beneficiaries rather than on the full value of the relevant asset. A number of exemptions from duty are also available in certain limited cases.

8.9.5.4 Foreign Trustees using Maltese Trust Law as the Proper Law

The choice of law to govern a trust is often not an issue discussed at length by the settlor and the trustee although it is a very important issue from several angles. The proper law of a trust governs several aspects of the trust including its validity, its construction, its effects and the rules applicable to its administration. When Maltese law is the proper law of the trust, then, Maltese law will govern these matters. Since Maltese law is contained in both the TTA and in the Civil Code, although this may be obvious in the case of a trust created by a Maltese-

domiciled settlor, it may cause some concern to a settlor who is not domiciled in Malta because although he may be able to assess the impact of the TTA, it may not be the case with the Civil Code. In order to address this concern, Article 6A(3) of the TTA states that when a Maltese law trust has no connections with Malta because of the domicile of the settlor at the time of settlement or because of the *situs* of the immovable property, the trust will be governed only by the TTA and the mandatory provisions of the Civil Code will not apply, notwithstanding that the trustee is located in Malta, the proper law is Maltese, the property (where movable) is in Malta or the trust deed or documents are executed in Malta.

8.9.5.5 Security Trustees

Since the introduction of trusts into Maltese law, the use of trusts in the context of security arrangements also became possible. This development has permitted a much greater flexibility in the Maltese legal approach to security. This is now not limited to the traditional real or personal forms of security listed in the Civil Code but also extends to any arrangement which operates as security under the fiduciary rule of the trustee, including the trustee being the creditor himself. In order to reflect this, the 2004 Trust Law Amendment Project made amendments to the Civil Code which specifically deal with security trusts and security trustees (particularly Article 2095E of the Civil Code). The amendments state that security may be created in favour of a trustee for the benefit of any creditor, and the trustee is in such cases to be treated as a creditor and is entitled to be registered as holder of security in the case of privileges and hypothecs, thus enjoying a preferential ranking position. The relevant articles of the Civil Code also continue to state that any arrangement whereby the rights of a creditor are legally protected, including any undertaking, guarantee, mandate, pledge, title transfer, grant, privilege, hypothec or the placing of property in possession or control of the trustee with rights of retention and sale shall constitute security. These arrangements do not all give the creditor a preferential ranking position but place assets within the ownership or control of a creditor, with a right of retention, or of a trustee for his benefit, and excluding it from the operation of normal rules on security and bankruptcy.

The Civil Code also states that a security trustee has the power and legal interest to file any legal proceedings for the enforcement of the security, and that, save as otherwise agreed to in writing, the security trustee shall not be subject to any obligations of the creditor. Furthermore it is also specifically stated that the beneficiaries of a security trust may assign their debt to third parties, and the assignees will enjoy the same rights as the beneficiaries under the security trust.

Such security arrangements must naturally stand the test of propriety – otherwise they will be null and remedies such as the actio pauliana under the Civil Code or the fraudulent preference actions would strike them down and the security trustee would remain bound by some fiduciary obligations towards the debtor so that he is bound to act honestly and fairly in the enforcement of rights of security. Indeed, a trustee will be liable for breach of duty if he does not act reasonably in the enforcement of a security trust arrangement.

8.9.6 Concluding Remarks

Maltese trust law is today closer to the classical English law of trusts than to models found in offshore centres or traditional tax havens. Unlike the UK, however, the law establishes a robust and very detailed regulatory regime, effectively complementing existing legislation on the prevention of money laundering and the funding of terrorism. Malta has also become a successful location for trust administration, just as it provides a good location for international banking, insurance and investment services, and also for the set up of both domestic and international trust structures.

As analysis will show, the use of trusts becomes important when the circumstances are such that make the use of this institute best suited to address the particular issue at hand. While it is not necessarily always the best solution in a given case, the TTA makes trusts fully available on the domestic plane as a viable option along with a host of other institutes provided for by Maltese law, including foundations. While tax planning and confidentiality are nowadays, in today's international regulatory environment and the consequential move towards transparency, increasingly becoming less of a motive for the use of such structures, trusts in themselves inherently contain so many benefits that there still remains plenty of scope for using trusts in various circumstances.

8.10 Foundations

Provisions regulating foundations in Malta were enacted in 2007, as a Second Schedule to the Civil Code. However, the institute of foundations is not new to Malta, since well before 2007 the Maltese legal system had already recognised foundations through case-law, Canon law and the recognition of foreign foundations. Thus the Second Schedule to the Civil Code essentially codified the existing authority on the subject by creating, in one piece of legislation, a specific legal regime that deals with

the rules and principles which govern organisations, including foundations. This law, therefore, provided the local and the international community with a legal framework establishing yet another legal institute under Maltese law, with its own specific rules and benefits.

8.10.1 Background

8.10.1.1 A Brief History of Foundations

Up until Justinian's rule, foundations were still in their embryonic stage and during this time non-human entities were not treated as persons. In the post-classical era (the years between 600 and 1450 A.D.) it became common for donations and bequests to be made to pious causes, orphanages and other similar purposes. As a result of this development, in the case of property bequeathed for pious causes, the church would act as administrator of the property so bequeathed, and this kind of arrangement may today be seen as the root of foundations. Thus, both the State and the church recognised the need to enact laws regulating foundations, with the church propounding its authority over pious legacies. This explains the influence of canon law on foundations. In fact, under Maltese law, pious foundations remain within the regulatory domain of canon law.

8.10.1.2 Foundations under Maltese Law Prior to 2007

Prior to 2007, foundations were already recognised in Malta and were mentioned in various legal provisions, including in the Code de Rohan, in Ordinance VI of 1868, and in the Income Tax Act of 1948.

Over the years, Maltese case-law has also consistently recognised foundations and their separate legal personality, notwithstanding the fact that domestic law did not expressly regulate foundations under a specific title of law. In Griscti vs Albanese (Court of Appeal (1935)) for example, the Court held that a foundation is created in accordance with the directions found in wills and other contracts. In Dottor Enrico Cauchi vs Giuseppe Pullicino et noe (Court of Appeal (1939)) the Court referred to the ecclesiastical foundation in question as an "enti morali" thus implying that it has legal personality, and was therefore capable of receiving an endowment left in a testamentary disposition.

8.10.1.3 The Second Schedule to the Civil Code

It was only with the coming into force of Act XIII of 2007 that foundations enjoyed a clear legal framework within which they could operate. The sources of this piece of legislation include those parts of the Italian Civil Code dealing with juridical persons, the Civil Code of Quebec, Canon law, the Trusts and Trustees Act, the Companies Act, and the provisions regulating the European Foundation.

The Voluntary Organisations Act (Chapter 492 of the laws of Malta) which regulates organisations within the voluntary sector, was also enacted in order to complement the Second Schedule to the Civil Code in those cases where the organisation qualifies as a "voluntary" or "non-profit making" organisation, as defined therein.

8.10.2 Salient Features Of A Maltese Foundation

The Second Schedule to the Civil Code defines a foundation as:

"...an organisation consisting of a universality of things constituted in writing, including by means of a will, by a founder or founders whereby assets are destined either:

(a) for the fulfilment of a specified purpose; or

(b) for the benefit of a named person or class of persons, and are entrusted to the administration of a designated person or persons. The patrimony, namely assets and liabilities, of the foundation is kept distinct from that of its founder, administrators or any beneficiaries."

From this definition it follows that a Maltese foundation:

- is an organisation;
- enjoys separate legal personality;
- is constituted by a founder or founders in writing, including by means of a will;
- consists of a universality of things (its patrimony) which are entrusted to the administration of a designated person or persons (the administrators), which patrimony and liabilities are kept distinct from those of the founders, administrators and beneficiaries;

8.10.2.1 The Establishment of a Foundation

Under Maltese law, a foundation may only be constituted by means of a public deed inter vivos or by means of a will, which is required to be drawn up, received and published by a notary public. The deed constituting the foundation must, on pain of nullity, contain the following information relating to the foundation:

- its name;

- its registered address (which must be located in Malta);
- its purposes or objects;
- its constitutive assets (Maltese law requires foundations to be established with an initial endowment worth at least 1,164.69. In the case of foundations established exclusively for a social purpose or as non-profit making, the initial endowment must be worth at least 232.94);
- the composition of its Board of Administrators;
- its legal representation;
- in the case of a private foundation, the names of the beneficiaries (which need not form part of the deed but may be indicated in a separate beneficiary statement).

8.10.2.2 The Registration Procedure

Under Maltese law, the registration of a foundation with the Registrar for Legal Persons within the Maltese Public Registry is an ad validitatem requirement for the foundation to be granted separate legal personality. Once registered the foundation is issued with a certificate of registration which is conclusive evidence that the requirements for registration have been met and that the foundation is duly registered. This registration requirement thus offers third parties dealing with the foundation additional comfort regarding the actual existence of the foundation.

The obligation to register the foundation lies with its administrators. The Second Schedule to the Civil Code also contains detailed rules regarding the registration procedure, the availability of registered documents and the consequences of non-registration.

8.10.2.3 Purpose and Private Foundations

The Second Schedule to the Civil Code provides for both foundations established for a social or other purpose (purpose foundations) as well as for foundations established for the private benefit of individuals (private foundations).

Purpose foundations do not make provision for beneficiaries, but are established for a particular purpose which needs to be indicated in clear terms, but need not necessarily be a social purpose and can actually be any lawful purpose. In the case of purpose foundations the deed must indicate the way in which the property of the foundation is to be applied in order to achieve its purpose. When no such indication is made, the administrators will exercise their discretion in applying the assets of the foundation in such a way that its purpose is achieved. Furthermore, the deed of foundation may also indicate how the property is to be applied once the purpose has been achieved.

Private foundations, on the other hand, are established for the benefit of one or more persons or for a class of persons, provided that when the dominant purpose of a foundation is to support a class of persons which constitute a sector within the community, the indication of such a class or of one or more members of such a class does not render the foundation a private foundation. The beneficiaries of a private foundation have legally enforceable rights against the foundation as stated by the terms of the foundation and the Second Schedule to the Civil Code.

In the case of private foundations, although the deed (excluding the beneficiary statement) is registered with the Registrar for Legal Persons, the Second Schedule contains detailed provisions regarding the accessibility of the deed establishing the foundation. These provisions ensure that it is only the founder, the administrators, those acting under the authority of any court, persons having a legitimate interest and such other persons who are permitted access by the deed itself or by applicable law who may access such documentation. This preserves the privacy of private foundations (for the same reasons as a will).

Unless it is evident from the statute that a foundation is a purpose foundation, Maltese law deems a foundation to be established for the private benefit of beneficiaries.

8.10.2.4 The Revocability of Foundations

The statute of a Maltese private foundation may state that it is revocable. Furthermore, much in the same way as the principle under *Saunders vs Vautier* operates for trusts, a private foundation may also be terminated upon a demand made by all the beneficiaries, provided that the founder, if alive, has given his consent. The revocation of a foundation does not invalidate acts lawfully carried out, or any lawful acts which are still in progress.

8.10.2.5 Segregated Cells

The Second Schedule to the Civil Code specifically permits the setting up of segregated cells within a foundation, thus permitting the foundation to achieve particular purposes with particular assets. Upon the creation of such a cell, its assets and liabilities will constitute a distinct patrimony from the other assets and liabilities of the foundation or of any other cell. Furthermore the assets of the cell will only be available to satisfy the obligations entered into by the foundation in relation to that cell and not for any other liabilities, and the general

assets of the foundation will not be made available for the fulfilment of any obligation undertaken in relation to the cell.

8.10.2.6 The Conversion of Foundations

Maltese law also caters specifically for the conversion of foundations into other types of organisations, such as limited liability companies, partnerships or trusts. This enhances the flexibility associated with the use of Maltese foundations.

8.10.2.7 Commercial Uses of Foundations

Under Maltese law foundations are generally prohibited from trading. This notwithstanding, foundations may still be used in the commercial sector and the law specifically provides that a foundation may be endowed with commercial property, a shareholding in a profit-making enterprise or any other asset which gives rise to income. Furthermore a foundation may also be used as a collective investment vehicle for the passive holding of a common pool of assets, the management of which is delegated to a third party, and as a vehicle for the purpose of securitisation transactions.

8.10.2.8 The Powers of the Court

The Second Schedule to the Civil Code provides that the Civil Court in its voluntary jurisdiction has authority over foundations, their administration, the beneficiaries and the other parties who have an interest in the foundation. The Courts are granted extensive powers in order to make sure that a robust law regulating foundations is in place, that the required levels of honesty and integrity are maintained and that the beneficiaries' rights are safeguarded. Administrators, beneficiaries and any person interested may apply to the Court to seek directives regarding various arrangements, such as the variation or revocation of any of the terms of the foundation deed.

8.10.2.9 Taxation of Foundations

For Maltese income tax purposes unless a foundation opts to be taxed as a trust, the default tax position is that a foundation is treated in the same way as a company that is ordinarily resident and domiciled in Malta. All tax provisions regulating Maltese companies will therefore equally apply to a foundation. The standard applicable tax rate for a foundation is the same as the corporate tax rate of 35%. The tax refunds applicable to a Maltese company would also be available to the beneficiaries of a foundation. Accordingly such beneficiaries may claim tax refunds in the same way as shareholders of a Maltese company do upon a distribution being made by the foundation (as further explained in Chapter 12).

A foundation may, rather innovatively, elect to be taxed in accordance with the applicable provisions dealing with trusts for the purposes of the Maltese Income Tax Acts. If such an election is made by the foundation all provisions regulating the taxation of trusts would apply to a founder, the foundation and its beneficiaries.

Foundations should also enjoy access to the vast network of Double Taxation Treaties to which Malta is a party (and as further detailed in Appendix D).

8.10.3 The Players Within A Foundation

The main players within a foundation are the founder, the administrators and the beneficiaries. A Supervisory Council or Protector may also be appointed, just as in the case of a trust.

8.10.3.1 The Founder

The founder is the person who makes the initial endowment to the foundation, appoints the administrators and determines the beneficiaries or the purpose for which the foundation is established. The founder is also the person who determines the terms and conditions in accordance with which the foundation should be governed and managed. He is, essentially, the creator of the foundation.

While the founder may also act as administrator, in the case of a private foundation the founder may also be a beneficiary, provided that in such a case the founder is not also the sole administrator.

Unless otherwise provided in the foundation deed the founder retains the right to amend the foundation deed, substitute, add or remove beneficiaries, and in the case of a private foundation the founder also retains the right to revoke the foundation, if set up as a revocable foundation. Furthermore, any additional endowments made in favour of a private foundation, require the consent of the founder.

The founder may also exercise supervision over the administration of a foundation, obtain copies of accounts held by the administrators and of inventories or descriptive notes in relation to the assets of the foundation. The founder also has the right to receive information from the administrators regarding the conduct of their administration, and may also appoint members of the supervisory council or the protector.

The role of the supervisory council or protector is to provide the founder with an added means of ensuring that the foundation structure contains the necessary checks and balances.

The Second Schedule to the Civil Code also contains specific provisions dealing with multi-founder foundations.

8.10.3.2 The Administrators

The board of administrators represents the organ through which the foundation acts, and is composed of administrators who manage the foundation. The administrators are inter alia responsible for maintaining possession and control of and safeguarding the foundation's property. The administrators are also bound to ensure compliance with the statute and the law and are granted powers of administration, representation and disposition. The Second Schedule to the Civil Code states that administrators may be remunerated from the income or capital of the foundation.

Administrators are bound by fiduciary obligations (Articles 1124A and 1124B of the Civil Code) such that they are bound to carry out their obligations with utmost good faith and to act honestly in all cases. More specifically administrators need to ensure that:

- the assets of the foundation are used to pursue the purposes and objects for which the foundation was set up;
- they keep a proper inventory of the assets of the foundation;
- they keep records of all income and expenditure;
- they disclose any conflict of interest;
- they do not receive undisclosed profits;
- they act impartially when their duties are owed to more than one person; and
- they exercise their obligations with the diligence of a *bonus paterfamilias*.

The administrators of the foundation can be natural or juridical persons, provided that in the case of a purpose foundation the administrators must be at least 3 natural persons, or 1 juridical person with at least 3 directors. The law requires the administrators to file a consent form with the Registrar for Legal Persons as evidence of their acceptance to act as such.

Since a foundation enjoys separate legal personality, as a general rule the administrators are not liable to third parties for the obligations of the foundation, except when:

- the administrators are guilty of fraud or bad faith;
- they have entered into obligations when they knew (or ought to have known) that there was no reasonable prospect that the foundation would avoid insolvency;
- when they have failed to declare a conflict of interest; or
- when they have committed a breach of duty in bad faith or have acted negligently.

In the latter case administrators are also liable to the beneficiaries.

The administrator's term of office ends upon his resignation, his removal by the Court, upon the coming into effect of a condition in the deed of foundation in terms of which an administrator is removed from office and in the case of a legal person, where steps for winding up have been taken.

Maltese law also requires administrators of a private foundation and administrators of non-charitable purpose foundations to be authorised to act as such by the MFSA, and this in line with the decision of the Maltese legislator to regulate trustees and other fiduciaries.

8.10.3.3 Beneficiaries

In the case of private foundations, the Second Schedule to the Civil Code requires the beneficiaries to be indicated as clearly and as fully as possible, and when the beneficiaries are not ascertainable the foundation is deemed to be for the private benefit of the founder and his successors. The administrators may be granted the power to decide, in their absolute discretion, which beneficiaries are to benefit, when and in what manner they are to benefit, and the quantity of their benefit. It is therefore possible to create a fully discretionary Maltese foundation that, to a large extent, would operate in the same way as a discretionary trust. Furthermore the founder may choose to appoint a beneficiary subject to a condition, for a specified time or up to a specified value.

As regards the rights of beneficiaries, Maltese law on foundations is very unique since it contains detailed provisions dealing with beneficiaries' rights which mirror the rules regulating the rights of beneficiaries under the Maltese Trust law. These include the right to information from the administrators regarding the state and amount of the foundation property, the right to be informed of their entitlement to benefit, the right to disclaim the whole or part of their interest, and the right to sell, charge or otherwise deal with their interest. However, these provisions dealing with the rights of beneficiaries are generally subject to the terms of the foundation deed.

It is this focus on beneficiary rights that lead Professor Philip Baker to remark that "*[i]f you look at the laws on foundations, I think you will agree that there is a real paucity of provisions dealing with the rights and interests of beneficiaries. Some laws are, effectively, silent on this point… There is one exception: Malta has quite a comprehensive provision, at page 226 of the Handbook, dealing with the rights and interests of beneficiaries. The draftsman was clearly inspired by the concept of the trust, and has adopted many trust ideas. But with those exceptions, generally the provisions for beneficiaries are fairly thin and rather limited*" ['*Beneficiaries of Trusts and Foundations'*, Philip Baker, GITC Review, Vol. VI No. 2 at page 7].

8.10.4 Foreign and International Foundations

Foreign foundations having legal personality under the foreign law by which they have been established are recognised in Malta as legal persons for all purposes of law. This applies also to international organisations which are afforded legal personality by virtue of a treaty to which Malta is a party. Foreign and international foundations, whether set-up for a social or private benefit, are obliged to register with the Registrar for Legal Persons before carrying on any activity on a regular basis in Malta.

The Second Schedule to the Civil Code also grants the Minister of Justice the power to enact subsidiary legislation regulating the re-domiciliation or continuation of foundations to and from Malta, thus enhancing the relocation of foreign foundations to Malta.

Just as in the case of trusts, following 10 years of practice and experience of Maltese Foundations law, amendments to the Second Schedule to the Civil Code dealing with foundations are in the pipeline.

The proposed amendments include significant amendments to the provisions on segregated cells (aimed at making provision for the benefit of persons with a disability so that families wanting to make such provision may avail themselves of foundations that are set up with multiple cells thereby benefiting from economies of scale), provisions to allow for the transfer of cells between organisations and the conversion of the cell to a new organisation; and the extension of the term for which a private foundation may be set up which has been increased from 100 years to 125 years, to mirror the term for trusts.

Concurrently, amendments to the provisions on fiduciary obligations regulated by the Civil Code are also being proposed, with the aim of bringing clarity in those instances which have, along the years, given rise to various disputes and which have been the subject of various court judgments. One such proposed amendment disallows prescription to run in favour of a fiduciary when in possession of property belonging to others. In all cases the proposed amendments are aimed at improving Malta's offering in the field of foundations and fiduciary obligations and to make it an even more robust jurisdiction within which to establish one's fiduciary structure.

GUIDE TO DOING BUSINESS
IN MALTA

CHAPTER 9: COMPETITION LAW, STATE AID AND PUBLIC PROCUREMENT

9.1 Competition Law

The firm's assistance is regularly sought in matters involving the application of competition law. The firm's antitrust experts are often involved in reviewing cross-border or national agreements to ensure compliance with EU and Maltese competition law. The firm assists clients, be they complainants or undertakings concerned, in investigations before the Office for Competition ("OC") and represents them before the Competition and Consumer Appeals Tribunal ("CCAT") and the superior courts. In the field of mergers, the firm's advice and assistance is frequently sought in relation to the notification requirement. The firm has also been resorted to for advice on EU State aid law in complex transactions in, inter alia, the energy, waste, transport and health sectors.

9.1.1 The Competition Act

The Competition Act (Chapter 379 of the Laws of Malta) aims to create well-functioning markets by curtailing anti-competitive conduct by undertakings on any relevant market in Malta. The two central substantive provisions, which correspond to Articles 101 and 102 of the Treaty on the Functioning of the European Union ("TFEU"), prohibit anti-competitive agreements and practices between undertakings and the abuse of a dominant position. Apart from these national provisions, the application of Articles 101 and 102 TFEU is also triggered when the conduct in question may affect trade between Member States. The Competition Act further deals with the enforcement of its provisions and creates administrative sanctions for offending undertakings.

9.1.1.1 Anti-competitive agreements and practices

Anti-competitive agreements and practices are governed by Article 5 of the Competition Act, which is modelled on Article 101 TFEU. Article 5(1) prohibits agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings having the object or effect of preventing, restricting or distorting competition within Malta or any part of Malta, in particular, those which:

- directly or indirectly fix the purchase or selling price or other trading conditions;
- limit or control production, markets, technical development or investment;
- share markets or sources of supply;
- impose the application of dissimilar conditions to equivalent transactions with other parties outside such agreement, thereby placing them at a competitive disadvantage; or
- make the conclusion of contracts subject to the acceptance by the other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Any such agreements or decisions are ipso jure null and unenforceable.

Article 5(3) provides an exception from the application of Article 5(1) where the following four conditions are met by the agreement, decision or concerted practice:

- it contributes towards the objective of improving production or distribution of goods or services or promoting technical or economic progress;
- it allows consumers a fair share of the resultant benefit;
- it does not impose on the undertakings concerned any restriction which is not indispensable to the attainment of the objective; and
- it does not give the undertakings concerned the possibility of eliminating or significantly reducing competition in respect of a substantial part of the products to which the agreement, decision or concerted practice refers.

The burden of proving whether these four conditions are satisfied falls on the undertakings claiming the benefit of the exception.

In terms of Article 6 agreements which have a minimal impact on the market are not subject to the prohibition in Article 5(1). This is the equivalent of the de minimis doctrine applied by the European Commission.

Article 101 TFEU applies concurrently with Article 5 of the Competition Act where an agreement between undertakings, a decision by an association of undertakings or a concerted practice may appreciably affect trade between Malta and any other EU Member State or States.

Apart from the 'effect on trade' criterion which is not included in Article 5, Article 5 is interpreted and applied in the same way as Article 101 TFEU. Where an agreement, decision or concerted practice which may affect trade between Member States falls outside Article 101(1) TFEU or fulfils the criteria mentioned in Article 101(3) TFEU, it may not be prohibited under Article 5(1) of the Competition Act.

9.1.1.2 Abuse of dominance

Article 9 of the Competition Act, which is based on Article 102 TFEU, prohibits any abuse by one or more undertakings of a dominant position within Malta or any part of Malta. Dominant position is defined under the Competition Act as a position of economic strength held by one or more undertakings which enables it or them to prevent effective competition being maintained on the relevant market by affording it or them the power to behave to an appreciable extent, independently of its or their competitors, suppliers or customers. The Competition Act provides an illustrative list of abusive practices. In particular, there is an abuse of a dominant position, where an undertaking:

- directly or indirectly imposes an excessive or unfair purchase or selling price or other unfair trading conditions;
- limits production, markets or technical development to the prejudice of consumers;
- applies dissimilar conditions, including price discrimination to equivalent transactions with different trading parties, thereby placing any or some of the trading parties at a competitive disadvantage; or
- makes the conclusion of contracts subject to the acceptance by the other party of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.

Again Article 102 TFEU applies concurrently with Article 9 of the Competition Act where an abuse of dominance may affect trade between Malta and any other EU Member State or States. Apart from the 'effect on trade' criterion which is not required under Article 9 of the Competition Act, Article 9 is interpreted and applied in the same way as Article 102 TFEU.

9.1.2 Merger Control

The Control of Concentrations Regulations (Subsidiary Legislation 379.08 of the Laws of Malta) provide a regulatory framework for the notification and assessment of concentrations. Concentrations which might lead to a substantial lessening of competition in Malta are prohibited.

A concentration refers to (i) the merging of two or more undertakings that were previously independent from each other, or (ii) the acquisition by one or more undertakings or by one or more persons already controlling at least one undertaking, whether by purchase of securities or assets, by contract or by any other means, of direct or indirect control of the whole or parts of one or more other undertakings, whether occurring in Malta or outside Malta. Notification of a concentration is required when in the preceding financial year (i) the aggregate turnover in Malta of the undertakings concerned exceeded 2,329,373.40 (formerly 1 million Maltese Liri), and (ii) each of the undertakings concerned had a turnover in Malta equivalent to at least 10% of the combined aggregate turnover of the undertakings concerned.

9.1.2.1 Protection of Employees following Mergers

The Employment and Industrial Relations Act, (Chapter 452 of the Laws of Malta) (the "EIRA") expressly stipulates that, when a business or other undertaking is transferred wholly or in part as a result of a legal transfer or merger, any employee in the employment of the transferor on the date of the transfer of the business is deemed at law to be employed by the transferee. In addition, the transferee assumes all the rights and obligations which the transferor had towards his employees. Consequently, in terms of the EIRA and the regulations made thereunder, the employees do not lose any old age, invalidity or survivors benefits under non-governmental supplementary company pension schemes. Furthermore, no employee may be dismissed in connection with the transfer - and the employer may not set up the transfer as a good and sufficient cause for dismissal - unless such dismissal occurs for economic, technical or

organisational reasons entailing changes in the workforce. If the transfer involves a substantial change in working conditions to the detriment of the employee, and such changes result in the termination of the contract of employment, the employer is regarded at law as having been responsible for the termination. If the undertaking or business preserves its autonomy, the status and function of the employees representatives must be preserved.

Following the transfer, the transferee is also bound to continue observing the same terms and conditions agreed by the transferor pursuant to the current Collective Agreement until its termination or the entry into force of another Collective Agreement.

In the case of a business or undertaking being transferred which employs more than 20 employees (counting all full-time and part- time employees), the representatives of the employees affected by the transfer are entitled to be informed of the date or proposed date of the transfer, the reasons for the transfer, the legal, economic and social implications of the transfer for the employees and the measures envisaged in relation to the employees. When the transfer affects the employees conditions of employment, consultations on the impact of the transfer on such conditions must then begin.

None of the above applies to the transfer of an undertaking or business if the transferor is the subject of bankruptcy proceedings or in the case of a judicial winding up or other insolvency proceedings. The regulations made under the EIRA also do not apply to transfers of administrative functions or re-organisations of public administrative authorities.

9.1.2.2 Tax Treatment of Mergers

Council Directive 90/434/EEC of 23 July 1990 on the common system of taxation applicable to mergers, divisions, transfers of assets and exchanges of shares concerning companies of different member States, as amended by Council Directive 2005/19/EC of 17 February 2005 (the "Merger Tax Directive") has been implemented into Maltese laws by Legal Notice 238 of 2003 (as amended by Legal Notice 59 of 2006). Thus, in the circumstances to which the Merger Tax Directive applies, tax neutrality is achieved for the merging company and its shareholders.

In the circumstances not covered by the Merger Tax Directive, the relevant provisions of the Maltese Income Tax Acts will apply to mergers. Thus, for example:

In case of inbound mergers, a step up in the value of the assets situated outside Malta may be availed of, subject to satisfaction of certain conditions;

In case of outbound mergers, the law deems there to be "no loss / no gain" where the merger does not produce any change in the individual direct or indirect beneficial owners of the companies involved, and the value held by each such ultimate beneficial owner.

This benefit is available subject to the satisfaction of certain conditions.

9.1.3 The Office Of Competition And The Competition And Consumer Appeals Tribunal

The Malta Competition and Consumer Affairs Authority Act (Chapter 510 of the Laws of Malta) establishes the OC and the CCAT (each as defined above). The CCAT is a specialised tribunal composed of a judge of the superior courts and two ordinary members.

The OC is one of the entities within the Malta Competition and Consumer Affairs Authority. In terms of the procedural provisions in the Competition Act, the OC has the power to investigate anti-competitive conduct and to decide whether there has been a breach of the EU and/or the national competition law. Should it find a breach, it can impose administrative fines based on the seriousness of the infringement. Remedies intended to restore the status quo ante may also be imposed.

The provisions in the Competition Act enabling the Director General to decide upon competition infringements and impose fines have been considered by the Constitutional Court, in the case Federation of Estate Agents v Director General (Competition) et decided on 3rd May 2016, to be in violation of the fair hearing right in the Constitution of Malta. Legislative amendments are expected to address this situation in the near future. It is unlikely, however, that the system of pecuniary penalties will be removed from the Competition Act.

Under the Control of Concentrations Regulations mentioned above, the OC examines and controls concentrations and may also impose fines, for instance, for implementing a concentration before notification or before it is cleared in terms of the Regulations.

The decisions of the OC can be appealed on points of law and fact before the CCAT. A further appeal

on points of law lies from the decisions of the CCAT to the Court of Appeal.

The OC also carries out an advocacy role by providing advice to public authorities about the competition implications of proposals for legislation or the competition constraints imposed by legislation, policy or administrative practices. It also promotes sound trading practices and encourages undertakings to comply with competition law.

9.1.4 Private Damages Action

Infringement of the competition rules can be used as the basis for a claim for damages to recover loss suffered as a result of the infringement. The Competition Law Infringements (Actions for Damages) Regulations (Subsidiary Legislation 379.09) transpose the EU Antitrust Damages Directive (Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ [2014] L 349/1). Damages cover the right to compensation for actual loss and for loss of profit as well as the payment of interest from the time the damage occurred until the capital sum awarded is actually paid.

9.2 State Aid

State aid control is an essential element of the EU's competition policy. The aim of the EU State aid rules is to control government interventions intended to relieve the budget of certain undertakings by providing them with an economic advantage where the aid may distort competition on the market and affect trade between Member States. Article 107(1) TFEU prohibits State aid unless this falls within the terms of the derogation found in Article 107(2) TFEU or could be considered compatible under Article 107(3) TFEU or fulfils the conditions of a Commission Block Exemption Regulation (Commission Regulation (EU) N°651/2014 of 17 June 2014 declaring certain categories of aid compatible with the internal market in application of Articles 107 and 108 of the Treaty, as amended by Commission Regulation (EU) 2017/1084; in exceptional circumstances, aid may also be granted in terms of the third and fourth paragraphs of Article 108(2) (de minimis aid is considered as falling outside Article 107(1) – see Commission Regulation (EU) No 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid and Commission Regulation (EU) No 360/2012 of 25 April 2012 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to de minimis aid granted to undertakings providing services of general economic interest)). Article 108 TFEU enables the European Commission to control State aid and requires Member States to notify the Commission of any plans to grant or alter aid. Malta, like all other EU Member States, is subject to the EU State aid rules.

At a national level, the State Aid Monitoring Board ("SAMB"), established by Article 57 of the Business Promotion Act (Chapter 325 of the laws of Malta), examines State aid in Malta and provides advice about the aid's compatibility with the EU State aid rules. The procedure before the SAMB is regulated by the State Aid Monitoring Regulations (Subsidiary Legislation 325.07). New aid must be notified to the SAMB by the provider of the aid. After examining the proposed aid, and giving the provider of the proposed aid opportunity to make submissions, the SAMB issues a final opinion on the compatibility or otherwise of the aid. Where the SAMB considers the aid to be compatible aid, it will notify the Commission of the proposed aid. On the other hand, where the SAMB considers that the aid is not compatible, it will notify the Commission of the proposed aid only if the provider of the aid requests it to do so. The SAMB can also examine non-notified aid, giving the provider of the aid the opportunity to make submissions, whilst requiring the provider to suspend the aid until the SAMB issues its opinion. In the latter case, if the provider of the aid does not comply with its opinion, the SAMB will report the matter to the Minister responsible for the provider concerned, but no obligation is imposed on the SAMB to notify the Commission of non-notified aid that it becomes aware of.

9.3 Public Procurement

The EU has established a complex body of laws which regulates the acquisition of goods, works, and services by contracting authorities in Member States. This body of laws includes provisions of primary legislation, namely the Treaty on the European Union ("TEU") and the TFEU, and, in specific cases, secondary legislation, namely a number of Directives. This consists mainly of four key Directives: the Public Sector Directive (Directive 2014/24), the Utilities Directive (Directive 2014/25), the Concessions Directive (Directive 2014/23), the Remedies Directive (Directive 1989/665 as amended) and the Utilities Remedies Directive (Directive 1992/13 as amended).

The EU procurement acquis has been transposed into Maltese law.

The national legal framework relating to public procurement was and still is enacted under the Financial Administration and Audit Act (Chapter 174 of the Laws of Malta) as the principal piece of legislation. The framework was revamped in October 2016 to transpose the new 2014 EU Directives on public procurement. The key applicable Regulations are the following:

- Public Procurement Regulations of 2016 (Subsidiary Legislation 174.04) ("Public Sector Regulations");
- Public Procurement of Entities operating in the Water, Energy, Transport and Postal Services Sectors Regulations of 2016 (Subsidiary Legislation 174.06) ("Utilities Regulations");
- Concession Contracts Regulations of 2016 (Subsidiary Legislation 174.10) ("Concessions Regulations"); and
- Emergency Procurement Regulations of 2016 (Subsidiary Legislation 174.09) ("Emergency Regulations") (collectively the "Malta Regulations").

The Malta Regulations allow for a number of procurement procedures to be used by contracting authorities: (a) open and restricted procedures; (b) competitive dialogue; (c) negotiated procedure (with or without publication); (d) framework agreements; (e) innovation partnership; and (f) dynamic purchasing systems).

9.3.1 General Characteristics of Public Procurement

The Malta Regulations impose an express statutory obligation on contracting authorities (also specifically named in schedules attached to the Malta Regulations) to treat economic operators equally and without discrimination and to act in a transparent and proportionate manner. The procurement procedures do not narrow competition either. Furthermore, contracting authorities remain bound by the general principles of EU public procurement law where the public contract is of a certain cross-border interest.

Contracting authorities are allowed to conduct so-called preliminary market consultations prior to the launch of any procurement procedure, including, engaging in arm's length exploratory discussions with economic operators in a specific industry or sector.

Moreover, in the case of complex procurement, certain procedures, such as competitive dialogue and negotiated procedure, are more appropriate and allow for a degree of flexibility and discussions with economic operators during the procurement procedure.

9.3.2 Thresholds

The Malta Regulations apply irrespective of the estimated value of the public contract to be awarded, but naturally different procurement processes and requirements may apply depending on the estimated value.

In terms of the Public Sector Regulations, a public contract with an estimated value up to 135,000 is specifically regulated by a relatively light-touch regime loosely referred to as 'departmental tender procedures' which varies from open/restricted calls for tenders, calls for quotes to direct orders which are managed by the contracting authority itself. A contracting authority may not use the following forms of procurement in case of departmental tenders: competitive dialogue, competitive procedure with negotiation, dynamic purchase systems, electronic auctions and negotiated procedure without public notice.

Should the value of a public contract exceed 135,000, then the procurement process is generally managed by the Director of Contracts (acting as a central procurement agency handling all logistical and legal matters on behalf of the contracting authority) and must be in any of the forms identified by the Public Sector Regulations, the preferred option being the open/restricted procedure. Naturally, there are exceptions. Specific contracting authorities identified by the Public Sector Regulations are allowed to manage the procurement process irrespective of the value of the public contract to be awarded.

If the estimated value of the public contract exceeds 5,225,000 in case of works, 135,000 in case of supplies and services and 750,000 in case of services for social and other specific services, then other requirements will apply in terms of publications and remedies, among other things.

In terms of the Utilities Regulations, a public contract published by an entity working in water, energy, transport and postal services sectors with an estimated value up to 418,000 is specifically regulated by a relatively light-touch regime loosely referred to as 'departmental tender procedures' which varies from open/restricted calls for tenders, calls for quotes to direct orders which are managed by the contracting authority itself. A contracting authority may not use the following forms of procurement in case of departmental tenders: competitive dialogue, competitive procedure with negotiation, dynamic purchase systems, electronic auctions and negotiated procedure without public notice.

Should the value of a public contract exceed 418,000, then the procurement process is managed by the Director of Contracts and must be in any of the forms identified by the Utilities Regulations, the preferred option being the open/restricted procedure. Naturally, there are exceptions. Specific contracting authorities identified by the Utilities Regulations are allowed to manage the procurement process irrespective of the value of the public contract to be awarded.

If the estimated value of the public contract exceeds 5,225,000 in case of works, 418,000 in case of supplies and services and 1,000,000 in case of services for social and other specific services, then other requirements will apply in terms of publications and remedies, among other things.

The expeditious award procedure under the Emergency Regulations can only be resorted to if the value of the public contract for works, services or supplies is less than 135,000.

The Concessions Regulations apply irrespective of the value of the concessions contract, but if the estimated value is above 5,225,000 a number of procedural guarantees apply, mainly, prior information concession notices and contract award notices.

9.3.2 Privatisations and Public Private Partnerships

The Malta Regulations do not regulate privatisations or PPPs specifically. The assessment of the proposed privatisation or PPP must be focused on the substance of the structure and mechanics of the deal, rather than its form. A competitive award procedure is statutorily required if the privatisation or PPP entails the purchase of works, supplies or services from an economic operator and/or the grant of a concession to an economic operator (in particular, where there is transfer of a function).

Even if a competitive award process is not strictly required by the Malta Regulations for a privatisation or PPP, the market economy operator principle under EU State aid law and the general principles of non-discrimination and equal treatment which emerge from the TEU and TFEU may be satisfied by such a competitive award process so long as it is open, non-discriminatory and transparent.

The Government of Malta has consistently, although there are exceptions, launched and managed competitive award processes for privatisations and PPPs. The Privatisation Unit which was set up in June 2000 usually takes care of privatisations. As of 2013, Projects Malta Ltd., a private limited liability company fully owned by the Government of Malta has been set up specifically to coordinate and facilitate PPPs.

9.3.3 Public Procurement Remedies

The Public Contracts Review Board ("PCRB") is the only judicial body vested with competence to hear appeals by interested parties or aggrieved bidders in connection with procurement processes and public contracts.

Firstly, any interested party may file an appeal at any time before the close of the call for competition to challenge any discriminatory technical, economic or financial specifications or any ambiguities in the procurement documents or clarifications or generally any illegal decisions taken by the contracting authorities.

Secondly, following the close of the call for competition, any bidder or any interested party may file an appeal against any decision of the contracting authority, in particular rejection or award decisions, within 10 days.

Thirdly, any bidder or interested party may also file an application to declare a concluded public contract ineffective if it was concluded without following a procurement process or in default of the standstill period. The appeal hearing is scheduled within approximately 1 month from the filing of the appeal and all submissions and evidence will be heard in one hearing. Following the conclusion of the hearing, the PCRB must deliver the decision within a span of 6 weeks, but in general, it is delivered within 1 week.

Following the delivery of the PCRB's decision, the interested party may lodge an appeal before the Courts of Appeal. The hearing will be scheduled within a span of 2 months from the date of filing of the appeal. There will be only one hearing where oral legal submissions (and usually no further evidence) are made. Following the conclusion of the oral hearing, the Court of Appeal must deliver its judgment within a span of 4 months.

CHAPTER 10: INSOLVENCY

10.1 Corporate Re-Structuring: Conversions, Amalgamations and Divisions

The Companies Act contains extensive provisions concerning:

(i) the conversion of commercial partnerships, such as limited liability companies (whether private or public), partnerships "en nom collectif" or "en commandite" or limited partnerships;

(ii) the amalgamation of partnerships "en nom collectif" or "en commandite" or limited partnerships;

(iii) the amalgamation of companies (mergers by acquisition);

(iv) the amalgamation of companies (mergers by the formation of a new company);

(v) the acquisition of one company by another which holds 90% or more of its shares;

(vi) the division of companies (by acquisition);

(vii) the division of companies (by the formation of new companies);

(viii) the division of companies (by the combination of division by acquisition with a division by the formation of one or more new companies); and

(ix) the division of companies (under court supervision).

10.2 Winding Up of Companies (Liquidation)

A company may wind up voluntarily or involuntarily. To liquidate a company voluntarily, a company has to pass an extraordinary resolution resolving to be dissolved. A company may decide to liquidate for any reason. In the case of a voluntary winding up, the company ceases to carry on its business from the date of dissolution except so far as may be required for the beneficial winding up. Any transfer of shares not being a transfer made with the sanction in writing of the liquidator and any alteration in the status of the members of the company made after the date of dissolution is void.

10.3 Court Winding Up of Companies

The court may order the dissolution of a company where:

- the business of the company is suspended for an uninterrupted period of twenty four (24)
- months;
- the company is unable to pay its debts;
- the number of members is reduced below two (2) and remains so reduced for over six (6) months; this does not apply to single member companies;
- the number of directors is reduced to below the minimum and remains so reduced for over six (6) months;
- the court is of the opinion that that there are grounds of sufficient gravity to warrant a dissolution and the consequent winding up of a company;
- where the period fixed for the duration of the company expires.

On the hearing of the winding up application, the court may either dismiss the application or make an order acceding thereto. The court may also make such interim orders as it thinks fit. The Companies Act has very lengthy and detailed provisions on winding up based on the U.K. Insolvency Act, 1986, including provisions regulating "fraudulent preference", "fraudulent trading", "wrongful trading" as well as various offences antecedent to dissolution or in the course of the winding up.

10.4 Company Rescue

In 2003, a new procedure regulating company recovery was introduced in order to provide for the possibility of a company being rescued notwithstanding that it is unable to pay its debts or if it is imminently likely to become insolvent. Essentially, the court is empowered to place a company under a company recovery procedure and to appoint a special controller to take over, manage and administer the business of a company for a period to be specified by the court. The court will grant such an order if it is satisfied that notwithstanding the bad state of a company, the financial and economic situation of the company can be improved in the interest of its creditors, employees and of the company itself as a viable going concern.

In 2017, this company rescue procedure was significantly amended so as to introduce inter alia the possibility of appointing a mediator. Where a compromise or arrangement is reached between a company and its creditors, or any class of them, or between the company and its members, or any class of them, the company or any creditors may with the sanction of not less than two thirds of the creditors or class of creditors, seek the appointment of a mediator in terms of the Mediation Act (Chapter 474). The mediator will then organise a meeting of the creditors, or class of creditors, as the case may be, in order for the creditors and the company to reach a compromise arrangement. If all the creditors, as a result of the mediation process, execute a written agreement containing a compromise or arrangement, such arrangement shall be binding on all creditors, and also on the company or, in the case of a company in the course of being wound up, on the liquidator.

CHAPTER 11: LABOUR LEGISLATION, RELATIONS, AND SUPPLY

11.1 Employer and Employee Relations

The Laws Governing the Employer and Employee Relations

Maltese employment law is essentially based on the contractual relationship between the employer and employee, with certain controls being imposed by statutory intervention. Whereas certain conditions of employment are governed by statute, other conditions such as restraint of trade are unregulated and parties can therefore agree on whatever terms and conditions are acceptable to them and are reasonable in the eyes of the judicature.

The Maltese legal system is a mixed one where elements of French and Italian law are amalgamated to form the basis of Maltese contract law. The legal theories applied by Maltese Courts when examining cases concerning the variation of an employment contract are heavily influenced by continental doctrine. For historical reasons however, the legal system applied in modern employment matters, such as disciplinary action or constructive dismissal, is strongly influenced by common law practices.

The main statute relating to employment law is the Employment and Industrial Relations Act (Chapter 452 of the laws of Malta, hereinafter referred to as the "EIRA") which regulates most aspects of the employee and employer relationship. At least 70 sets of regulations are presently in force, tackling various aspects of employment law ranging from family leave entitlements to more sophisticated subjects such as working time or the protection of employment in the context of a business transfer. There are also Wage Regulation Orders in force. A Wage Regulation Order (also known as a sectoral order) specifies a number of employment parameters and rights which are applicable only to a particular sector of the employment market, for example the Food Manufacture Industries Wage Regulation (Subsidiary Legislation 452.68 of the laws of Malta). Traditionally, collective agreements are considered to be binding private agreements and are enforceable between the parties. Many disputes between employers and employees are settled in the Industrial Tribunal which has exclusive jurisdiction to hear cases relating to dismissal, trade disputes and other employment law disputes such as those related to harassment, discrimination and the observation of the working time requirements, most of which have originated from Malta's membership of the European Union.

11.2 Categories of Employees

A Maltese employee is usually categorised as a full-timer (also known as a whole-timer) or a part timer. A full-timer is a person who works an average of 40 hours per week, whilst a part-timer is an employee who works less than the full-time or the whole-time weekly hours of work. Broadly speaking, part-timers are not to be treated less favourably than full or whole-timers in so far as remuneration and benefits are concerned. Pro-rata calculations and payments as compared to whole-timers or full-timers are usually applicable to part-timers. Also, under the Part-Time Employees Regulations (Subsidiary Legislation 452.79 of the laws of Malta) part-timers are entitled to pro rata benefits, leave and other entitlements. A similar right not to be treated less favourably also applies to fixed-term contract employees as compared to those comparable employees employed on an indefinite-term contract.

It is also possible to engage employees to work on zero-hour contracts (or on a "*casual basis*" as it is more commonly referred to in Malta). Moreover there is no obligation for an investor to hire a minimum number of Maltese nationals.

Within the local employment market there is an increasing trend to opt for gig working, however in practice this tends to be quite restricted. This is due to the fact that Maltese law regulates self-employment through the Employment Status

National Standard Order (Subsidiary Legislation 452.108 of the laws of Malta, hereinafter referred to as the "Self Employment Regulations") which tends to restrict the use of self-employment in Malta. Consequently, employers and employees tend to opt for contracts of employment unless they feel that a self-employed arrangement can be in place notwithstanding the Self Employment Regulations.

11.3 Hiring and Working in Malta

11.3.1 Recruitment

Maltese employers recruit through a variety of sources, the most popular being advertising in newspapers and fee-charging employment agencies. The Jobsplus Corporation is a government-run corporation which provides a free recruitment service, normally used by employers to recruit less senior employees. Private employment agencies require a licence to operate. The said licence is issued by the Department of Employment and Industrial Relations after the prospective applicants go through an *ad hoc* application process.

11.3.2 Work Permits

Since the freedom of movement principles in relation to citizens of the EU are respected, EU citizens (other than Croatian nationals) have not required a work permit to work in Malta since June 2011. The principle established in the Immigration Regulations (Subsidiary Legislation 217.04 of the laws of Malta) is that an EU citizen may reside in Malta, but where such residence is to exceed 3 months the EU citizen is to apply for a permit to reside in Malta. This administrative procedure is fairly straightforward and is not document intensive.

On the other hand, non-EU citizens and Croatian citizens always require a "single-work permit" in order to work and reside in Malta. Although the Maltese government has not yet specified when Croatian nationals will be exempt from work permit requirements, under EU rules, the right of Croatian nationals to work as an employee in another EU country may be restricted by transitional arrangements until 30 June 2020. A single-work permit can be obtained within 3 months and is valid for one year, and is renewable for further periods of 1 year. If a non-EU citizen wishes to be employed in Malta, he/she must have a genuine prospect of securing employment before entering Malta to work and the employer needs to prove that the employee's skills are not easily found within the Maltese Islands. In addition to this, Identity Malta (an agency established by the Government of Malta) has recently launched a new scheme, referred to as the "Key Employee Initiative", which seeks to facilitate the employment of highly-specialised non-EU individuals, who wish to be employed in Malta. The scheme is available to managerial or highly-technical posts which require the relevant qualifications or adequate experience related to the job being offered and where the prospective gross salary is of at least 30,000.

Malta has also implemented EU Directive 2014/66/EU of the European Parliament and of the Council of 15 May 2014 on the Conditions of Entry and Residence of Third-Country Nationals in the Framework of an Intra-Corporate Transfer. This directive has been implemented in Malta through Subsidiary Legislation 217.21 of the laws of Malta, and seeks to enable the secondment of non-EU key personnel which are already in employment with a group company, to work within another company within the same group throughout the EU. This will result in new skills and knowledge, innovation and enhanced economic opportunities for the host entities.

11.3.3 Discrimination

The Constitution of Malta and other Maltese employment statutes protect employees from discrimination on the grounds of sex, religion, race, disability, age and sexual orientation. Discrimination against part-timers and persons employed on fixed-term contracts is also regulated.

Discrimination at the work place is unlawful as far as recruitment, treatment during the course of employment and termination is concerned. Chapter 4 of the Maltese Constitution protects persons from being discriminated against on a number of grounds in every aspect of life, including work. With the advent of EU membership, a number of anti-discrimination provisions with direct relevance to the workplace were included in the EIRA and a number of statutory instruments were introduced in order expand upon the general principles found in the EIRA. Such instruments include the Equality for Men and Women Act (Chapter 456 of the laws of Malta) which focuses on sexual discrimination; the Employment and Industrial Relations Interpretation Order (Subsidiary Legislation 452.89 of the laws of Malta) which instructs the Industrial Tribunal to refer to the EU Directives on discrimination, and the Equal Treatment in Employment Regulations (Subsidiary Legislation 452.95 of the laws of Malta) which focuses on the principle of equal treatment in relation to religion and religious belief, racial or ethnic origin, disability, age and sexual orientation. In order to strengthen the equality and human rights framework in Malta, the Government has also proposed the following bills:

- a bill to implement an Equality Act that will aim to meet the highest anti-discrimination and equality standards, and which will repeal the Equality for Men and Women Act (Chapter 456 of the laws of Malta); and
- a bill to implement a Human Rights and Equality Commission Act that will set up an equality commission.

11.4 Contracts of Employment

11.4.1 Form

According to Maltese law, every employee must have a written contract of employment or a minimum statement of conditions. Such a contract of employment may be written or verbal. However, if the contract entered into is verbal, the employer then has 8 working days to give the employee either a contract of employment or a written statement of minimum conditions according to the Information to Employees Regulations (Subsidiary Legislation 452.83 of the laws of Malta). Such information includes normal rates of pay, overtime rates, hours of work, place of work, and a reference to all the leave to which an employee is entitled.

11.4.2 Probationary Period

The probationary period within which the employer may terminate the employment of the employee without assigning any reason is set at a maximum of 6 months for non-key employees. However if the employee's employment is of a technical, executive, administrative or managerial nature and the employee's wage is at least double the minimum wage, the probationary period is usually set at 1 year.

11.4.3 Confidentiality and Non-Competition

The Maltese Courts have adopted the English doctrine that an employee is bound by a general duty of good faith and a duty not to disclose the employer's confidential information. This is strengthened by a statutory provision in the Civil Code (Chapter 16 of the laws of Malta) which stipulates that an employee owes a fiduciary obligation not to disclose or use confidential information he had access to during the course of his employment.

Recent Maltese jurisprudence on non-compete clauses, has separately held enforceable a clause which prohibits the employee from soliciting clients of the employer with whom he had contract. A general clause which prohibits direct competition with the employer after the employment has been terminated has been declared by the Maltese Courts to be unenforceable. Similarly, general provisions which purport to restrict employees working for competitors after termination of the employment will rarely be enforceable, even if they are reasonable and the employer has a legitimate interest to protect (for example, confidential information or trade secrets). The Maltese Courts have emphasised that the limitations of time and market have to be reasonable within a small area such as the Maltese Islands. An ex-employee cannot be forced to leave his country in order to pursue his vocation.

11.5 Pay and Other Incentives

11.5.1 Basic Pay

For the year 2017, the national minimum wage per week for whole-time employees is the following:

Age	Weekly Minimum Wage
Age 18 years and over	€169.76
Age 17	€162.98
Age 16	€160.14

On the 28 April 2017 the social partners signed a National Agreement on the Minimum Wages, which agreement was made effective via the National Minimum Wage National Standard Order (Subsidiary Legislation 452.71 of the laws of Malta, hereinafter referred to as the "Minimum Wage Regulations"). The Minimum Wage Regulations established the following:

(i) Employees on a minimum wage shall, upon completion of the first year of employment with the same employer be entitled to mandatory increases (over and above the Cost of Living Adjustment ("COLA") for 2017, 2018 and 2019), of 3 per week in the second year of employment, and upon completion of the second year, to an additional 3 per week.

(ii) Employees earning more than the basic minimum wage will still be entitlement to the portion of the increases mentioned in point 1, above during the second and third year of employment.

(iii) For existing employees on the minimum wage who have been with the same employer for more than a year, as on the date of signing of the agreement this measure will be introduced as follows:

- With effect from 1st January 2017: up to a maximum of 3 per week adjustment as per point 2 above.
- In 2018: up to a maximum of 3 per week adjustment as per point 2 above.
- In 2019: the balance to reach an increase of 6 in the minimum wage provided that the employee will have been in employment with the same employer for three years or more.

(iv) Employees on the minimum wage who are transferred or offered new employment with another company within the same group of companies will carry their accumulated years of service for the purpose of the increases stipulated above.

Overtime at one-and-a-half times the normal rate is generally paid in respect of additional hours worked in excess of 40 hours per week. On the other hand, more senior employees are normally paid monthly in arrears and are generally not paid for overtime since their remuneration package is deemed to compensate them for any overtime worked.

11.5.2 Fringe Benefits

Common fringe benefits may typically include private health insurance and cars (particularly for more senior employees). Such fringe benefits are usually contractual and employers may not unilaterally withdraw them. On the 8th August 2017, a new legal notice was published, whereby a number of changes were made to the Fringe Benefit Rules (Subsidiary Legislation 123.55 of the laws of Malta). One of the changes concerns the value of share option benefit schemes, which shall be subject to tax at the rate of 15%. The value of share option benefit scheme, now also includes share award schemes. The benefit shall be deemed to be provided on each date that shares are issued or transferred to the beneficiary in terms of the share award scheme in question. The value of the share option benefit scheme shall be calculated by assessing the market value of the shares less any amount which has been paid or payable by the employee for such shares. The income represented by the value of the benefit shall be subject to tax at the rate of 15%.

11.5.3 Deductions

Although generally, according to the EIRA, employers are prohibited from making deductions from pay, they are obliged to deduct income tax at source through the Final Settlement System ("FSS") scheme. They are also obliged to deduct employees' National Insurance contributions (social security contributions). Further deductions such as trade union membership fees or occupational pension scheme contributions may only be deducted with the written consent of the employee.

11.6 Hours of Work

The usual working week is 40 hours in most sectors of employment. Specific limitations on the hours of work are imposed by the Organisation of Working Time Regulations (Subsidiary Legislation 452.87 of the laws of Malta, hereinafter referred to as the "Working Time Regulations") on the hours worked each day and each week by workers (this includes employees and agency workers). Generally working time must not average more than 48 hours per week over a reference period of 17 weeks. Manufacturing and tourism industries have a reference period of 52 weeks and collective agreements may also extend the reference period from 17 weeks up to a maximum of 52 weeks. Under the Working Time Regulations however, a Maltese worker may opt out of the Working Time Regulations in order to work more than the 48-hour average stipulated by law.

Workers are also entitled to a daily rest of at least 11 consecutive hours in each 24-hour period and a weekly rest period of not less than 24 hours in any seven-day period. Night workers (i.e. where at least 3 hours of daily working time is worked at night as a matter of course) must not work in excess of 8 hours in each period of 24 hours if the type of work carried out is particularly strenuous.

11.7 Holidays, Family Leave, Sick Leave and Other Time Off

11.7.1 Vacation Leave

The Organisation of Working Time Regulations (Subsidiary Legislation 452.87 of the laws of Malta) give the employee a right to 200 hours of paid vacation leave. Any leave taken beyond that period is taken at the option of the employer and is usually unpaid. Annual leave accrues on a pro rata basis from the first day of employment. Money may not be paid in lieu of untaken statutory holiday entitlement except on termination of employment. According to the National Holidays and other Public Holidays Act (Chapter 252 of the laws of Malta) there are 14 national and public paid holidays per annum. These are to be given over and above the statutory annual vacation leave, to the extent they fall on a working day for the employee.

11.7.2 Maternity Leave

Subject to satisfying the necessary statutory criteria, a woman is entitled to 18 weeks of maternity leave. The first 14 weeks are on full pay and 4 weeks at the minimum wage rate payable by the social security department. An employee who is pregnant, breastfeeding or has recently given birth, and who could be exposed to a risk at work that could jeopardise her health and safety and/or the pregnancy or the child, is entitled to special maternity leave for as long as the risk exists.

With effect from July 2015 a maternity leave fund was launched. By means of this fund, employers in the private sector are entitled to a reimbursement of the salary of the 14 weeks maternity leave paid to their employees. For this purpose private sector employers are obliged to pay a contribution to the said fund, which contribution is calculated on the number of employees employed.

11.7.3 Adoption Leave

According to the Adoption Leave National Standard Order (Subsidiary Legislation 452.111 of the laws of Malta), all employees who are the parents of an adopted child are entitled to an uninterrupted period of 18 weeks of adoption leave. The entitlement is the same as maternity leave, meaning that 14 weeks are fully paid by the employer with right of reimbursement from the maternity leave fund, whilst an additional 4 weeks which are unpaid and optional, if taken, will be paid at the minimum wage rate by the social security department. If both parents are in employment and if both wish to avail themselves of adoption leave, such leave is to be divided between them as they may agree in writing. During such period of leave, the employee shall be entitled to all the rights and benefits which may accrue to other employees and shall also be entitled to resume work in the post previously occupied upon return to work.

11.7.4 Parental Leave

According to the Parental Leave Entitlement Regulations (Subsidiary Legislation 452.78 of the laws of Malta, and hereinafter referred to as the "Parental Leave Regulations"), both parents who are in employment have the right to be granted unpaid parental leave in case of birth, adoption, fostering or legal custody of a child to enable them to take care of that child for a period of 4 months until the child has attained the age of 8 years. Parental leave can be availed of in established periods of 1 month each. An employee must have at least 12 months continuous service with his employer to be eligible to apply for parental leave, unless a shorter period is agreed to. Moreover, the Parental Leave Regulations also provide that the employee's balance of parental leave is to be transferred to a new employment.

11.7.5 Leave for Medically Assisted Procreation

The Leave for Medically Assisted Procreation National Standard Order (Subsidiary Legislation 452.114 of the laws of Malta) sets out the minimum requirements to grant a period of paid leave to employees who undergo the process of medical assisted procreation. Prospective parents who undergo the process of medically assisted procreation, in or outside Malta, shall be entitled to 100 hours of paid leave which is to be shared between the parents who are in employment. If the prospective parent who will be the receiving person is in employment, the employee shall be entitled to 60 hours of paid leave. On the other hand, if the prospective parent who is not the receiving parent is in employment he or she shall be entitled to 40 hours of paid leave. The 100 hours of paid leave for medically assisted procreation shall be granted for every process of medically assisted procreation, up to a maximum of 3 processes.

11.7.6 Illness

Employees absent from work by reason of sickness have a right to receive sick pay from their employer. The number of days that may be taken as sick leave varies according to sector, however, in terms of the Minimum Special Leave Entitlement Regulations (Subsidiary Legislation 452.101 of the laws of Malta), in default of an applicable Wage Regulation Order, an employee is entitled to the equivalent in hours of 2 working weeks per year. Part of the cost may be recouped from the social security department in that employers may deduct the benefits that are received by the employee from the wages due.

11.7.7 Other time off

Employees are entitled to injury leave of up to 1 year on full pay. Such benefit is payable by the employer and may be reduced by the injury benefit which the employee receives from the State.

In terms of the Minimum Special Leave Entitlement Regulations (Subsidiary Legislation 452.101 of the laws of Malta), in default of an applicable Wage Regulation Order, an employee is entitled to 1 day of bereavement leave, 2 days of marriage leave, 1 day of birth leave, and jury service leave for as long as it is necessary.

11.8 Termination of Employment

11.8.1 Individual Termination

An employer wishing to terminate the employment relationship must be careful to comply with both the statutory and contractual requirements with regard to reasons for and procedures leading to dismissal.

11.8.2 Notice

The EIRA lays down a minimum period of notice that will apply where the indefinite contract of employment does not make any provision for notice. According to the EIRA, an employee on an indefinite term contract (be it full time or part time) may terminate the contract of employment by giving notice to the employer of his intention to resign from the end of the notice period.

The statutory minimum period of notice depends on the length of time the employee has been in employment with a particular employer. The notice cannot however exceed a maximum of 12 weeks. The statutory notice periods apply to all categories of employees.

The EIRA provides that longer periods may be agreed by the employer and employee in the case of technical, administrative, executive or managerial posts. There are no notice periods for termination for "*good and sufficient cause*" (e.g. gross misconduct).

If an employer prefers that an employee does not work his or her notice period, the general practice is for employers to pay salary in lieu of the notice period. There are no special formalities for making such payments (except as to the deduction of tax where required).

The EIRA also specifies that an indefinite contract may be terminated by the employer for reasons of redundancy. By inference, it can be deduced that a definite term contract of employment may not be terminated for reasons of redundancy. The EIRA establishes that the notice period that is applicable to resignations also applies in cases of redundancy. In some industries there may be enhanced contractual redundancy packages available but these usually depend upon the collective agreements in place.

11.8.3 Reasons for Dismissal

Although the employer is always free to terminate an indefinite contract of employment, it may only do so for a "*good and sufficient cause*" or in cases of redundancy. Even so, the employee may always contest the redundancy or the actual termination in the Industrial Tribunal. In cases where the employee is engaged on a fixed-term contract, the law stipulates that if either party wishes to terminate the employment before the time stipulated at law, the defaulting party has to pay to the other an amount which is equal to half the wages that the employee would have earned in the period remaining. Also, according to the EIRA, fixed-term contracts may not be terminated on the basis of redundancy.

Generally, it is accepted that theft, misconduct and a genuine redundancy are a "*good and sufficient cause*" for termination. As with most common law jurisdictions, the employer must show that he has a good reason for the dismissal and that a fair and reasonable procedure has been followed when implementing the dismissal.

There is no minimum or maximum cap on the award that the Industrial Tribunals may give. The most common type of Tribunal award is financial compensation although if the employee was not in a position of trust, he may ask for, and be granted, reinstatement.

In practice, when the employer does not have a "*good and sufficient cause*" for termination, the parties would negotiate an out of Court settlement agreement pursuant to which the employer pays the employee an *ex-gratia* payment and in exchange of the *ex-gratia* payment the employee waives his rights at law to file a dispute against the employer.

11.9 Industrial Relations

11.9.1 Trade Unions

Although union membership is stronger in some industries than in others, it can easily be said that the Maltese working population is still highly unionised. Major unions include the General Workers Union ("GWU") and the Union Haddiema Maqghudin ("UHM") (these are general unions covering various sectors) and the sector specific unions such as the Malta Union of Bank Employees ("MUBE") and the Malta Union of Teachers ("MUT"). Employer's unions such as the Malta Employer's Association ("MEA") are also popular.

The Recognition of Trade Unions Regulations (Subsidiary Legislation 452.112 of the laws of Malta, hereinafter referred to as the "Recognition Regulations") regulates the recognition of trade unions within the workplace and further outlines the verification process in order to determine whether the union is a recognised union. According to the Recognition Regulations, in cases of recognition, a trade union representing 50+1% member workers within a given bargaining unit is usually recognised.

11.9.2 Collective Agreements

Collective agreements are popular in the traditional sectors of employment such as manufacturing and tourism and these agreements usually regulate matters such as pay, working hours, holidays, dispute procedures and procedures to deal with redundancy. Collective agreements are considered to be private agreements that are binding on the parties.

11.9.3 Trade Disputes

Maltese law does not have a comprehensive "strike law" or any enshrined right to strike. Rather, unions are granted statutory protection from liability, which they would otherwise incur under tort law, when taking industrial action pursuant to a trade dispute. It is debatable whether an employee who takes industrial action loses the right to pay during that period. It is however unfair to dismiss an employee who is taking part in "official" industrial action.

11.10 Information, Consultation and Participation

There are at present no formalised requirements for employee participation in Malta, although some employers operate share schemes as an additional remuneration incentive. However, obligations do arise with respect to consultation and the provision of information to appropriate representatives (these are usually either elected employee representatives or representatives of a recognised trade union).

The obligation for employers to inform and consult are the following:

(i) In the case of a collective redundancy, as defined in the Collective Redundancies (Protection of Employment) Regulations (Subsidiary Legislation 452.80 of the laws of Malta) if proposed to take place within a period of 30 days, consultation with appropriate representatives must take place at the earliest possible opportunity.

(ii) Employers are required to provide certain information to appropriate representatives upon the transfer of an undertaking as defined in the Transfer of Business (Protection of Employment) Regulations (Subsidiary Legislation 452.85 of the laws of Malta).

(iii) Employers must consult with employees on health and safety matters. Consultation has to be with the worker's health and safety representatives as elected by the workforce or with employees directly.

(iv) Under the European Works Council Directive 94/45/EC, any undertaking or group of undertakings with at least 1,000 employees in the EU and 150 employees in more than one EU State may have to set up a works council or a procedure for informing and consulting employees at European level. This directive has been implemented in Malta via the European Works Council Regulations (Subsidiary Legislation 452.86 of the laws of Malta). While the initial establishment of the employee negotiating body is quite clearly regulated, subsequent negotiations are generally up to the parties to regulate.

(v) Directive 2005/56/EC of the European Parliament and of the Council of the 26 October 2005 on Cross Border Mergers of Limited Liability Companies which has been transposed via the Employee Involvement (Cross-Border Mergers of Limited Liability Companies) Regulations (Subsidiary Legislation 452.103 of the laws of Malta) lays down the criteria for participating rights and information and consultation rights.

(vi) The Maltese government has also implemented the Employee (Information and Consultation) Regulations (Subsidiary Legislation 452.96 of the laws of Malta) which oblige employers who employ 50 employees and above to have a system of information and consultation with the employee's representatives on matters which are likely to lead to substantial changes in the work organisation or contractual relations.

CHAPTER 12: **TAXATION**

Malta's tax legislation is modelled on UK legislation and reference is frequently made to English case-law for the purpose of interpretation. The Income Tax Act (Chapter 123 of the laws of Malta), the Income Tax Management Act (Chapter 372 of the laws of Malta) and the Duty on Documents and Transfers Act (Chapter 364 of the laws of Malta) are the three main pieces of legislation. Maltese fiscal laws have, however, been subject to various amendments throughout the years. Malta has evolved from its initial tag as an "offshore" centre in the 1980s to an "onshore" financial centre within the EU since May, 2004. Malta's taxation system was scrutinised in detail by the EU at the time of Malta's accession to the EU in 2004. Certain changes were made in 2007 to Malta's tax system to address concerns raised by the EU Commission during such discussions, and Malta has since then consolidated its attractiveness as a serious jurisdiction from which business can be conducted within the EU and in a tax efficient manner.

Malta has retained the cornerstone of its tax system, namely the imputation system of taxation of dividends whereby shareholders are imputed with the tax suffered by the company on distributed profits. Apart from the imputational tax credit, tax refunds are now available in varying degrees to all shareholders of Maltese companies without discrimination and irrespective of whether the said company is deriving such profits from outside Malta or not.

Income tax is payable on (i) income and (ii) capital gains derived from the transfer of certain chargeable assets, including:

- the transfer of the ownership of, or usufruct over, immovable property or any rights thereon;
- the transfer of the ownership, or usufruct of, or from the assignment or cession of any rights over, any securities, business, goodwill, copyright, patents, trademarks and trade-names; or
- gains or profits arising from a transfer of the beneficial interest in a trust; or
- the transfer of ownership, or usufruct of, or from the assignment or cessation of any rights over, any interest in a partnership.

Maltese resident individuals are taxed at progressive rates with the highest rate being 35%, whereas Maltese companies are taxed at a flat rate of 35%. However, the availability of tax refunds for shareholders of Maltese companies in certain cases may significantly lower the effective tax burden.

A company is considered resident in Malta for tax purposes if it is incorporated in Malta irrespective of its place of management and control. Non-Maltese companies whose control and management are exercised in Malta are also considered to be tax resident in Malta but would only be chargeable to tax on: (i) their income/ capital gains arising in Malta; and (ii) on any income arising outside abroad and remitted to Malta.

Local investment income (and certain foreign source investment income when paid through an authorised financial intermediary) is subject to a final tax liability of 15%.

Non-residents are exempt from tax on any interest arising in their favour from Malta sources.

The transfer of shares and other securities give rise to a liability for payment of stamp duty in terms of the Duty on Documents and Transfers Act. Documents in virtue of which marketable securities are transferred by or to any person resident in Malta attract stamp duty. However, an exemption from stamp duty in the case of acquisitions and/ or disposals of marketable securities can be obtained if any if the following conditions are satisfied by the Maltese company:

(i) the Maltese company: (a) carries on more than 90% of its business interests outside Malta; and (b) has more than half of its ordinary share capital, voting rights and rights to profits, held by persons who are not resident in Malta, and who are not owned or controlled by, directly or indirectly, nor act on behalf of, an individual or individuals who are ordinarily resident and domiciled in Malta;

(ii) the Maltese company: (a) either expects to have more than half of its distributable profits allocated to its Foreign Income Account or none of its assets are situated in Malta; and (b) has more than half of its ordinary share capital, voting rights and rights to profits, held by persons who are not resident in Malta and who are not owned or controlled by, directly or indirectly, nor act on behalf of, an individual or individuals who are ordinarily resident and domiciled in Malta; and (c) has been determined as having its majority of its business interests situated outside Malta;

(iii) the Maltese company is licensed as collective investment scheme; or

(iv) the Maltese company is a person holding an investment services licence issued under the Investment Services Act (Chapter 370 of the laws of Malta) and whose activities comprise the provision of management, administration, safekeeping or investment advice to collective investment schemes.

In order to qualify for the exemption in any of the 4 aforementioned cases, the Maltese company must not own any immovable property in Malta nor hold any shares in another company which directly or indirectly holds immovable property in Malta.

In the case of an exemption based on any of criteria (i) or (ii) above, the exemption will no longer be applicable if the shares of the Maltese company are acquired by an individual who is ordinarily resident and domiciled in Malta, or by any other person (other than another company in possession of a stamp duty exemption under Article 47(3) of the Duty on Documents and Transfers Act) who is owned or controlled, or acts on behalf of, an individual who is ordinarily resident and domiciled in Malta.

As a general rule, VAT is charged on every supply of goods or services that takes place in Malta made for a consideration by a taxable person acting as such. The standard VAT rate in Malta is 18%. A reduced rate of 7% applies to hotel accommodation and licensed premises, whereas a reduced rate of 5% applies to supply of electricity, works of art, collectors' items and antiques, certain confectionary products, medical accessories, printed maters and others. A 0% rate applies to, inter alia, exports, intra-community supplies made to taxable persons, international transport, and the supply and repair of commercial aircraft and vessels. Furthermore, other supplies are exempt from VAT in Malta, including the transfer and certain rentals of immovable property, insurance, banking and investment services.

Malta has concluded Double Taxation Agreements with a considerable number of countries to ensure that the same income is not taxed twice in cross-border situations – see Appendix D for a full list and the applicable maximum rates of withholding tax payable by persons from Treaty countries when making payments of dividends, royalties or interest to a Maltese person pursuant to the relevant Double Taxation Agreement. Most of the Double Taxation Agreements to which Malta is a party are principally modelled on the OECD Model Double Taxation Convention on Income and on Capital. The wide Treaty network makes Malta an attractive jurisdiction for the location of companies which are in receipt of income or capital gains from Treaty countries.

12.1 Refunds and Participating Holding Exemption

Subject to certain conditions, tax refunds may be claimed and obtained by the shareholders of a Maltese company upon a distribution of dividends by the company.

Refunds are available in respect of taxed profits allocated to the Foreign Income Account ("FIA") and the Maltese Taxed Account ("MTA"). The FIA consists of an exhaustive list of income which is considered to arise outside Malta or is closely connected to such income. It mostly refers to passive income though trading profits may also be allocated to the FIA in certain circumstances. The MTA is a default taxed account to which all taxable profits which have not been allocated to the FIA, the Final Taxed Account and Immovable Property Account, would be allocated.

The standard refund is of 6/7ths of the tax paid by the company, but this is reduced to:

- 5/7ths where the company's income consists of passive interest and royalties; and
- 2/3rds where the company's income was allocated to the FIA and double taxation relief is claimed. In this case, a type of tax sparing relief known as the Flat Rate Foreign Tax Credit at a rate of 25% would be available for the company when computing its tax liability and effectively reduces the tax payable by it.

Refunds are gross of actual double taxation relief such that if any material foreign tax is suffered, this may significantly reduce the net Malta tax paid.

Furthermore, where income or gains allocated to a company's FIA are derived from a "participating holding" ("PH") or from the transfer of such PH, the company may opt to claim a participation exemption and not pay any tax on such income or gains. Alternatively, if the company opts to pay tax, the refund available to shareholders is 100% of the Malta tax paid by the company.

A PH inter alia exists if a Maltese resident company has an equity holding (including units in funds and interests in a partnership) in a non-resident company or certain partnerships where such holding confers an entitlement to at least 10% of any two of the following rights:

(i) a right to vote;

(ii) a right to profits available for distribution; and

(iii) a right to the assets available for distribution on a winding up.

Other commonly utilised criteria for a PH are:

- where the Maltese company has an investment which represents a total value of at least 1,164,000 (or equivalent in other currencies) and the holding is held for an uninterrupted period of 183 days; or
- when on account of its holding (and even if it holds less than the 10% of the equity shares referred to above), the company has a certain level of control and/ or other rights (e.g. share pre-emption rights, director appointment rights) in the entity not resident in Malta.

In respect of dividends received from a PH, the exemption applies only if 1 out of 3 anti-abuse tests is satisfied. The test would be satisfied if:

- the holding is in an EU incorporated or resident entity; or
- the foreign entity is subject to any foreign tax of at least 15%; or
- the foreign entity does not derive more than 50% of its income from passive interest or royalties.

If the holding does not fall within any of these three "safe harbours", the "participation exemption" can nonetheless be availed of if:

- the "participation holding" or equity held by the Malta company is not a "portfolio investment" as defined in the Income Tax Act; and
- the foreign company has already been subject to any foreign tax at a rate of 5% or more, or the "passive interest or royalties" of the foreign company have already been subject to foreign tax at a rate of 5% or more.

12.2 Certain Features Relevant for Cross-Border Tax Structures

In view of Malta's full imputation system of taxation of dividends, no further Maltese tax is payable by the shareholders in respect of any taxed profits received from a Maltese company by way of dividend. Non-resident shareholders are not obliged to file a Maltese tax return in respect of dividends received.

Subject to certain conditions, refunds are not taxable in the hands of non-resident shareholders and are paid by the Commissioner of Inland Revenue in Malta on production of an appropriate dividend voucher. Refunds of Malta tax must be paid by the Commissioner of Inland Revenue to the respective shareholder by not later than 14 days after they become due. Claims for this refund are time-barred after 4 years. Refunds are payable in the same currency in which the profits were charged to tax.

No withholding taxes apply in respect of royalties and interest payable to non-residents. This exemption applies provided the:

- the person is not engaged in any trade or business in Malta to which the interest or royalties are effectively connected; and
- the beneficial owner is non-resident and is not owned and controlled, directly or indirectly by, nor acts on behalf of, individuals who are ordinarily resident and domiciled in Malta.

There are no Maltese withholding taxes on profits or capital gains derived by non-residents on a transfer of shares in companies which do not own directly or indirectly immovable property in Malta. This exemption is subject to the same beneficial ownership test as that applicable for royalties and interest.

12.3 Notional Interest Deduction Rules

Malta has Notional Interest Deduction Rules which apply in respect of income derived from basis year 2017 onwards by Maltese companies, Maltese

partnerships, and permanent establishments in Malta of foreign companies (the "Qualifying Entities").

The rationale behind these rules is to enable deductions to be claimed by such Qualifying Entities for notional interest deemed to have been incurred on their "equity", thereby bringing about a more level playing field on the tax front for equity financing when compared to debt financing. Such Qualifying Entities could already claim a deduction for tax purposes in respect of any debt financing costs incurred by them.

The rules provide for the method in which the notional interest deduction can be claimed for every financial year, this being a multiplication of:

- the Qualifying Entity's "Risk Capital" as at the year end;

by

- the Reference Rate, namely the risk free rate set by reference to the yield to maturity on Malta Government Stocks with a remaining term of approximately 20 years (currently around 2%) plus a premium of 5%.

The Qualifying Entity's "Risk Capital" includes its share capital, share premium, positive retained earnings, interest free loans or other debt, and any other reserves resulting from a contribution to the Qualifying Entity, as well as any other reserve shown in the financial statements as "equity".

For every financial year, a Qualifying Entity can, at its option, claim by way of a deduction against its chargeable income, a notional interest of up to 90% of its chargeable income (excluding any grossing-up of its income through use of the flat rate foreign tax credit).

When a Qualifying Entity claims a notional interest deduction in any year, an amount equal to such deduction is deemed for Maltese tax purposes to have been received by the shareholders or partners of the Qualifying Entity as deemed interest income. Such deemed income would be taxable in the hands of any individual recipient depending on whether or not that individual is subject to tax in Malta. The 15% rate of tax for investment income would not be applicable in such a case. The tax position of any non-resident individual would also need to be analysed in his country of residence in respect of any such deemed interest income.

If the shareholder/ partner of a Qualifying Entity is itself another Qualifying Entity, the deemed interest income is neutralised since the afore-said shareholder/ partner can claim a notional interest deduction which is equal to the deemed income, and without the 90% limitation.

If a Qualifying Entity claims a notional interest deduction, an amount equal to 110% of the profits which benefitted from the deduction are to be allocated to its final tax account. No tax refunds are available for the shareholders of the Qualifying Entity in respect of such amount.

Where the notional interest deduction in any year exceeds 90% of the chargeable income of the Qualifying Entity, the excess can be carried forward indefinitely for use in future years.

12.4 Taxation Of Expatriate Employees

A Maltese Company engaged in trading activities is permitted to employ expatriate personnel. In terms of the Income Tax Act, tax is only payable by resident and non-domiciled expatriates on any amounts arising or received in Malta. The normal rates of personal taxation rise progressively to a maximum tax rate of 35%. No tax is payable by expatriates on capital gains arising outside Malta.

12.4.1 Executives in the Financial Services Industry

Persons who are not domiciled in Malta and who hold an executive position in the financial services industry in Malta may opt to have their employment income derived from such office taxed at a flat 15% rate of tax.

The beneficial 15% flat rate of tax may only be availed of if the employee:

(i) derives income from a qualifying contract of employment; and

(ii) has an annual income of at least 82,881 (basis year 2017), as adjusted annually for inflation; and

(iii) performs certain employment activities with a company licensed and/ or recognised by the Malta Financial Services Authority ("MFSA"); and

(iv) satisfies a number of other conditions.

For non-EU nationals, the following additional two conditions must also be satisfied:

(i) the person must not be physically present in Malta, in aggregate, for more than 4 years (unless he exceeds his stay in accordance with a one-time extension); and

(ii) the person cannot, directly or indirectly, acquire real estate in Malta or hold any direct or indirect beneficial interests in such real estate.

A person wishing to avail himself of the 15% flat rate of tax must first apply to the MFSA for a determination that he is eligible to be taxed at this rate and in accordance with the aforementioned conditions.

The benefit of the 15% flat rate of tax can be availed of for employment income earned during calendar year 2010 and subsequent years up to a maximum period (which may be extended once) of:

- 5 consecutive years for nationals of EU countries, Switzerland, Norway, Lichtenstein and Iceland; and
- 4 consecutive years for other nationals.

Restricted periods apply to persons who were already performing employment activities in Malta prior to 1 January 2011.

12.4.2 Tax Benefits for Investment Services and Insurance Expatriates

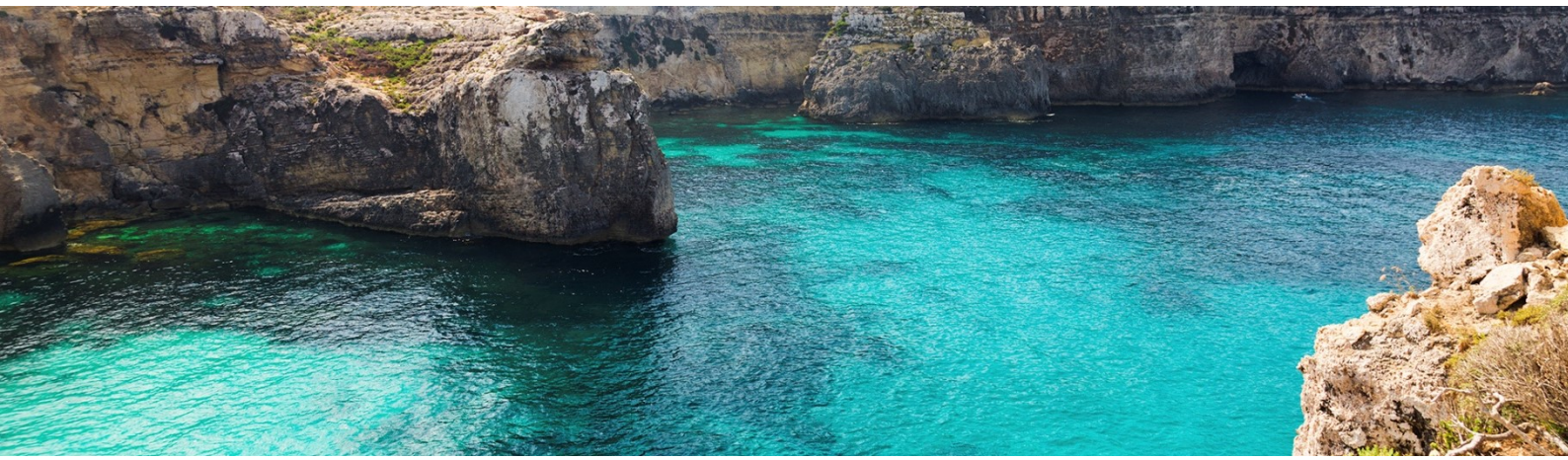
Certain tax benefits apply to a person who qualifies as an "investment services expatriate" or "insurance expatriate", and is:

- either not ordinarily resident and not domiciled in Malta; or
- was not resident in Malta for a minimum period of 3 years immediately preceding the year he commences employment with an investment services company or an insurance company and during such period the individual has been engaged on a full time basis in a similar position outside Malta.

An investment services expatriate or an insurance expatriate should not be liable to income tax on the following expenses incurred by the insurance company or the investment services company for the benefit of the expatriate or his immediate family:

- removal costs in respect of relocation to or from Malta;
- accommodation expenses incurred in Malta;
- travel costs in respect of visits by the expatriate to his immediate family to or from Malta;
- provision of a car for the use of the expatriate in Malta;
- an allowance of not more than Euro 600 per calendar month;
- medical expenses and medical insurance; and
- school fees in respect of the children of the expatriate.

The above exemption will apply to the expatriate for the 10 consecutive years starting from the date when the expatriate is first subject to tax in Malta.



GUIDE TO DOING BUSINESS
IN MALTA

CHAPTER 13: CITIZENSHIP AND RESIDENCY

13.1 The Individual Investor Programme

By virtue of the Individual Investor Programme of the Republic of Malta Regulations (Subsidiary Legislation 188.03 of the laws of Malta, hereinafter referred to as the "IIP"), Malta grants naturalisation by investment, after a rigid and thorough due diligence process, to foreign high net worth individuals and their families (including, unlike some other programmes, the parents and grandparents of the main applicant, the spouse, as well as the children of either spouse) who are of a reputable standing.

The principal investment required under the IIP, now well tried and tested, takes the form of a monetary contribution to the National Development and Social Fund established by the Government of Malta for the purpose of bringing about qualitative improvements in Malta through public interest, social and capital projects. The IIP is the first programme of its kind to have had its validity officially recognised by the European Commission.

Identity Malta Agency is the official agency of the Government of Malta for citizenship, passports and acts of civil status and is the entity which is officially responsible for the implementation of the IIP.

The acquisition of Maltese citizenship through the IIP does not of itself have any specific tax implications from a Maltese law perspective

13.1.1 Features of the IIP

- The acquisition of citizenship occurs on the date of issue of the "Certificate of Naturalisation". Children born before this date will not automatically become Maltese citizens. However, children born after this date will become Maltese citizens.
- The names of all persons acquiring Maltese citizenship during the previous 12 month period, whether by registration, naturalisation or under the IIP, are published once annually in the Malta Government Gazette. Therefore, applicants who are naturalised under the IIP are not singled out.
- Once all requirements are fulfilled and the Certificate of Naturalisation has been issued, Maltese citizenship is considered to have been granted permanently.
- The acquisition of Maltese citizenship through the IIP does not, of itself, have any specific tax implications from a Maltese law perspective.

The IIP is the first programme of its kind to have had its validity officially recognised by the European Commission

13.1.2 Benefits of the IIP

Non-EU applicants who successfully acquire citizenship under the IIP benefit from:

- significantly improved mobility within the member states of the EU and the European Free Trade Association ("EFTA");
- visa-free travel to more than 160 countries, including the USA, Canada and the UK; and
- an unrestricted right to live and work within all the Member States of the EU.

13.1.3 Eligibility of the IIP

In order to qualify for citizenship under the IIP, the main applicant must:

- be at least 18 years old;
- meet the application requirements outlined in the IIP;
- provide proof of residence in Malta for a period of 12 months preceding the day of issuance of the Certificate of Naturalisation; and
- provide proof that the he and his dependants are covered by a global health insurance policy of at least 50,000 per person per annum and that they are capable of maintaining this cover indefinitely.

The Maltese language is not a requirement for naturalisation and no citizenship tests are carried out.

13.1.4 Contribution and Investment Requirements

The main applicant must satisfy the following contribution and investment requirements:

- a contribution of 650,000 must be made to the National Development and Social Fund;
- a residential property in Malta with a minimum value of 350,000 must be purchased or a residential property in Malta must be leased for a minimum annual rent of 16,000, subject to the obligation of not selling or terminating the lease for at least 5 years;
- an investment in stocks, bonds or other investment vehicles worth a minimum of 150,000 as may be identified from time to time by Identity Malta Agency, such investment to be held for at least 5 years.

13.1.5 How to Apply

An individual who would like to apply for naturalisation under the IIP must apply to Identity Malta Agency through the medium of an approved or accredited person.

The IIP specifies a minimum period of 6 months and a maximum period of 24 months for the completion of the application process. However, in the majority of cases the process takes between 14 and 18 months.

13.1.6 Table of Contribution and Fees

Contribution to the National Development and Social Fund	
Main Applicant	€650,000
Spouse	€25,000
Each dependant child aged 0-17	€25,000
Each dependant child aged 18-26	€50,000
Each dependant aged 55 or above	€50,000
Due Diligence Fees (payable on submission of application)	
Main Applicant	€7,500
Spouse	€5,000
Each dependant child aged 0-12	€0
Each dependant child aged 13-17	€3,000
Each dependant child aged 18-26	€5,000
Each dependant aged 55 or above	€5,000
Identity Malta Agency Fees	
Passport Fees (per person)	€500
Bank Charges (per application)	€200

Once all requirements are fulfilled and the Certificate of Naturalisation has been issued, Maltese citizenship is considered to have been granted permanently.

13.2 The Malta Residency and Visa Programme

The Malta Residency and Visa Programme (the "MRVP") operates in terms of the Malta Residence and Visa Programme Regulations (Subsidiary Legislation 217.18 of the laws of Malta, hereinafter referred to as the "Visa Regulations"). The MRVP enables individuals who are not EU, EEA or Swiss nationals to apply for and be issued with a certificate which is deemed to constitute a residence permit (the "Certificate"). This residence permit grants the beneficiary (and his registered dependants) the right to reside, settle and remain indefinitely in Malta.

The Malta Residence and Visa Agency (the "Agency") is the Government of Malta entity officially responsible for implementing the MRVP. Each application has to be administered by a registered accredited person, or by an approved agent registered with the Agency.

The MRVP, unlike the IIP, does not lead to naturalisation, and benefiting from the MRVP does not automatically entitle beneficiaries to naturalisation under the IIP. The IIP and the MRVP are therefore separate programmes which operate independently from each other.

Cost effective and fast application process

13.2.1 Features of the MRVP

The residence permit granted by the MRVP is valid for 5 years and is automatically renewed. The Certificate issued by the Agency is monitored annually for the first 5 years from its issue, and every 5 years thereafter. The Certificate does not by itself entitle the beneficiary to any other rights under the Immigration Act (Chapter 217 of the laws of Malta), apart from residence. The Certificate shall be considered to have been ipso jure withdrawn as soon as the beneficiary infringes any of the provisions of the Visa Regulations.

13.2.2 Benefits of the MRVP

Beneficiaries who successfully obtain a Certificate under the MRVP benefit from:

- the attainment of a permanent residence for themselves and their registered dependants in Malta or Gozo
- freedom of movement within the Schengen area
- eligibility to apply for Long Term Residency in line with the Immigration Act, provided certain specific criteria are satisfied
- the option to redeem their investment after 5 years.

13.2.3 Eligibility under the MRVP

In order to qualify for a residence permit under the MRVP, the main applicant must:

- be at least 18 years old;
- possess a valid travel document for himself and his dependants;
- possess health insurance in respect of all risks normally covered for Maltese nationals for himself and his dependants, across the whole of the Schengen area and States associated with the Schengen activities of the EU;
- have an annual income of not less than 100,000 arising outside Malta or be in possession of capital of not less than 500,000;
- must not benefit under the Residents Scheme Regulations (Subsidiary Legislation 123.79 of the laws of Malta); the High Net Worth Individuals – EU, EEA/Swiss Nationals Rules (Subsidiary Legislation 123.130 of the laws of Malta); the Malta Retirement Programme Rules (Subsidiary Legislation 123.134 of the laws of Malta); the Global Residence Programme Rules (Subsidiary Legislation 123.148 of the laws of Malta); the Qualifying Employment in Innovation and Creativity (Personal Tax) Rules (Subsidiary Legislation 123.141 of the laws of Malta); or the Highly Qualified Persons Rules (Subsidiary Legislation 123.126 of the laws of Malta).

13.2.4 Contribution and Investment Requirements

The main applicant must also satisfy the following contribution and investment requirements:

- either purchase immovable property situated in Malta at a price of not less than 320,000 or rent property in Malta for not less than 12,000 per annum, which property (whether in the case of sale or lease) needs to remain so held for a minimum of 5 years from the date of the Certificate; by way of special

concession, if property is situated in Gozo or in the South of Malta, the purchase price may start from as low as 270,000 and, if a lease is opted for, the annual rent may start from 10,000;

- hold an initial investment of 250,000 in a form determined from time to time by the Agency, which investment needs to be held for a period of 5 years from the date of the Certificate; and
- pay a contribution of 30,000 (from which the initial fee of 5,500 paid on application is deducted).

13.2.5 How to Apply

An individual who would like to apply for residence through the MRVP must apply to the Agency through the medium of an approved or accredited person.

The Visa Regulations do not specify a time period for the completion of the application process; however, completion of the application process is not expected to exceed 4 months from the submission of the application and the supporting documentation.

13.3 Grant of Citizenship for Exceptional Services Regulations

Naturalisation on the basis of exceptional services rendered to the Republic of Malta or to humanity

By virtue of the Grant of Citizenship for Exceptional Services Regulations (Subsidiary Legislation 188.04 of the laws of Malta, hereinafter referred to as the "Exceptional Services Regulations") an applicant who has rendered exceptional services to the Republic of Malta or to humanity, or whose naturalisation is of exceptional interest to the Republic of Malta, may apply for Maltese citizenship by naturalization.

The Exceptional Services Regulations clarify that "*exceptional*" means "*unusually excellent or manifestly superior at a local level*"

refers primarily to contributions by scientists, researchers, athletes, sports people, artists and cultural performers

13.3.1 Features of the Grant of Citizenship for Exceptional Services

Each applicant will be subject to a 4-tier due diligence process which will be carried out by one or more internationally recognised, specialised due diligence agencies.

Applications for naturalistion in terms of the Exceptional Services Regulations will be subject to review and evaluation by an Evaluation Board which will then prepare a reasoned opinion setting out the reasons why such an application should be considered for approval. This opinion will be referred to the Minister responsible for citizenship, who will determine whether a certificate of naturalization as a citizen of Malta should be granted to the particular applicant. It is the Minister responsible for citizenship who has the sole authority to grant citizenship in terms of the Exceptional Services Regulations.

The names of all persons acquiring Maltese citizenship during the previous 12-month period, whether by registration, naturalisation under the IIP, or under the Exceptional Services Regulations, are published once annually in the Malta Government Gazette. Therefore, applicants who are naturalised under the Exceptional Services Regulations are not singled out.

13.3.2 Eligibility under the Exceptional Services Regulation

In order to be eligible to apply for citizenship under the Exceptional Services Regulations, the applicant must:

- reside in Malta for at least 8 months in the period preceding the date of application;
- except in the case of an applicant who is a minor, provide proof of title to residential property in Malta;
- provide proof of the exceptional services rendered to the Republic of Malta or to humanity, or if the applicant claims that his naturalisation is of exceptional interest to the Republic of Malta, provide an endorsement by a designated competent body in Malta;
- be recommended by two people who are qualified to act as sponsors for persons that

apply for Maltese citizenship by naturalisation; and

- satisfy the application conditions set out in the Exceptional Services Regulations.

13.3.3 How to Apply

Applications will need to be submitted in person to the Citizenship Unit within Identity Malta Agency, which will examine the application made.

The Exceptional Services Regulations contemplate a roughly 12-month process for the application process to be complete:

- 3 months for Identity Malta Agency to confirm that the application is formally correct, all relevant information provided as well as the applicant's background has been verified by independent due diligence agencies, and that an appropriate risk weighting has been carried out;
- 1 month for the Citizenship Unit within Identity Malta Agency to carry out further background checks, if necessary, to further review the application and to refer it to the Evaluation Board;
- 6 months for the Evaluation Board to review the application and all documentation and reports and prepare a reasoned opinion for the Minister responsible for citizenship. The board may also opt to interview the applicant or the legal representative of the competent body endorsing the applicant; and
- 2 months for the Minister responsible for citizenship to determine whether a certificate of naturalisation as a citizen of Malta shall be granted.

13.4 Passports

Maltese passports are not acquired easily by persons who are not born in Malta or married to Maltese persons, other than through the Individual Investor Programme referred to in Section 13.1 above and the Grant of Citizenship for Exceptional Services Regulations referred to in Section 13.3 above. The Government has discretionary powers in this area and it does not actively encourage the issuance of Maltese passports to foreigners unless they are married to Maltese.

13.5 Visas

Malta has a visa abolition agreement with a number of countries, which include most members of the Council of Europe. Details on the countries, the citizens of which require a visa in order to visit Malta can be found in Appendix C below.

Citizens of those countries which require a visa to visit Malta need to apply for an entry visa at a Maltese embassy or consulate of their country of origin before proceeding to Malta. Where no embassy or consulate is available, a written request should be made to the Commissioner of Police or through the Ministry of Foreign Affairs.

On 21 December 2007 Malta joined the Schengen system at the end of a gradual process of adjusting to the common visa regime provided by the Convention Implementing the Schengen Agreement.

Maltese nationals and citizens (including those naturalised through the Individual Investor Programme referred to in Section 13.1 above and the Grant of Citizenship for Exceptional Services Regulations referred to in Section 13.3 above) are eligible to apply for admission into the United States of America under the Visa Waiver Program (VWP).

13.6 Work Permits

Work permits may be needed in order for foreign nationals to work in Malta. Further detail on work permits can be found in Section 11.3.2.

CHAPTER 14: FINANCIAL SERVICES

14.1 Preliminary

The Malta Financial Services Authority (the "MFSA") is the single regulator vested with responsibility to regulate and supervise financial services in Malta. The MFSA is established under the Malta Financial Services Authority Act, (Chapter 330 of the laws of Malta, hereinafter referred to as the "MFSA Act") and it has the legal status of a body corporate having a distinct legal personality.

Its current responsibilities include the regulation and supervision of capital markets, the banking industry, financial and electronic money institutions, the insurance business, investment funds, investment services, regulated markets, pension products, retirement schemes, as well as trustees. The MFSA took over the functions of the Malta Financial Services Centre (which was responsible for insurance business and investment services), the Central Bank of Malta, insofar as these related to the regulation of banks (also referred to as "credit institutions") and financial institutions, and the Malta Stock Exchange (previously responsible for listing of securities on the Malta Stock Exchange).

The MFSA is also the Listing Authority for the purposes of the Financial Markets Act (Chapter 345 of the laws of Malta) and the Resolution Authority for the purpose of Directive 2014/59/EU and the Recovery and Resolution Regulations (Subsidiary Legislation 330.09 of the laws of Malta).

The MFSA also has other functions emanating from law, such as promoting the general interests and legitimate expectations of consumers of financial services, promoting fair competition practices and consumer choice in financial services, and monitoring the working and enforcement of laws that affect consumers of financial services in Malta. The MFSA is also empowered to issue directives and guidelines regulating the procedures and duties of persons licensed or authorised by it, or falling under its regulatory or supervisory functions. The Registry of Companies also forms part of the MFSA, with the Registrar of Companies being generally responsible for ensuring compliance with the Companies Act (Chapter 386 of the laws of Malta). The MFSA premises also

house the Inland Revenue Department's International Tax Unit, which complements the services offered by the MFSA to operators in the financial services sector.

The responsibilities of the MFSA are complemented by the functions of the Central Bank of Malta (the "CBM") whose primary objective is that of maintaining price stability and this within the context of the CBM participating in the European System of Central Banks. The CBM s tasks also include that of ensuring the stability of the financial system and overseeing and regulating the operation of payment systems.

Malta's accession as a full Member State of the EU proved to be a watershed year for the establishment of Malta as an international financial services centre. The funds and captive insurance industry (together with the establishment of remote internet gaming operations in Malta) were the biggest growth areas over the past few years.

The EU passport opportunities, the sophisticated and flexible legal regime, coupled with various double taxation treaties (mostly with exchange of information provisions based on the Organisation for Economic Cooperation and Development ("OECD") model, details of which can be found in Appendix D) and a re-dimensioning of fiscal incentives, have contributed to positioning Malta as a jurisdiction of choice for financial services businesses wishing to establish a presence in the EU.

14.2 Banking and Financial Institutions

14.2.1 General

Banking business in Malta is regulated by the Banking Act (Chapter 371 of the laws of Malta, hereinafter referred to as the "Banking Act") which derives its main regulatory concepts and supervisory practices from the relevant EU

regulations and directives. With the advent of the EU Single Supervisory Mechanism (in November 2014), banks which are deemed to be "Significant" within the criteria set out in the Capital Requirements Directive IV (the "CRD IV") and the Capital Requirements Regulation ("CRR"), are subject to the direct supervision of the European Central Bank (the "ECB"). The MFSA retains responsibility for the "Less Significant Banks", in close cooperation with the ECB.

The term "business of banking" in Maltese law refers to the business of a person who accepts deposits of money from the public withdrawable or repayable on demand or after a fixed period, or who borrows or raises money from the public (including the borrowing or raising of money by the issue of debentures or debenture stock or other instruments) and, in either case for the purpose of employing such money in whole or in part by lending to others or otherwise investing for the account and at the risk of the person accepting such money. This applies whether the person does so as principal or as agent, and if carried out as a regular feature of the person's business. The business activities of a credit institution (i.e. a bank) may, besides the business of banking, include any or all of the additional activities listed in the Schedule to the Banking Act, which includes financial leasing, payment services, portfolio management and advice, safe custody services, issuance of electronic money and others.

It may also be the case that a bank would be required to obtain more than one licence depending on its proposed activities.

Banks are either set up as Maltese banks with a head office in Malta or as a branch or a subsidiary of a foreign bank. The latter may also set up a representative office in Malta for the promotion or assistance of banking business carried on overseas.

14.2.2 Banks from EU or EEA States

Any bank authorised by an authority in the EU or the EEA (a "European Credit Institution" or "ECI") can use its EU passport to establish a branch in Malta or provide cross-border services in Malta without the requirement of obtaining a separate licence from the MFSA. A number of conditions need to be satisfied before this right may be availed of, including that the ECI must notify its home State regulatory authority of its intention to establish a branch in Malta or to provide cross-border services in Malta.

In the case of an ECI operating in Malta through a branch, the home State authority of the ECI is afforded the right, after having informed the MFSA, to conduct on-site verifications in Malta of certain information held by an ECI. The foreign authority may also request the MFSA to carry out such verifications. The MFSA may also itself carry out on-site verifications of branches established in Malta to discharge its responsibilities under applicable law.

Subsidiary regulations also provide for the exercise of passporting rights by Maltese credit institutions. Effectively, therefore, a licence to carry on the business of banking issued in Malta entitles the bank to establish branches or to provide cross-border services in all the States of the EU or the EEA with minimal formalities. This has proved to be of significant interest to promoters who have chosen to use Malta as a platform for launching their banking activities into Europe.

14.2.3 The Depositor Compensation Scheme

The Depositor Compensation Scheme (the "Scheme") is a rescue fund for depositors of failed banks which are licensed by the MFSA. The Scheme is managed by a Committee appointed by the MFSA. The Scheme covers "eligible" deposits made with banks licensed under the Banking Act incorporated in Malta including their branches operating anywhere in the EEA.

The total compensation is subject to a limit of 100,000 per depositor (irrespective of the number of accounts held by that depositor with a failed bank), although there may be instances where the depositor is entitled to receive additional compensation (up to 500,000) for specific balances. The Scheme covers all currencies without distinction, although in the event that the Scheme pays compensation, it will pay such compensation in Euro. The Scheme will not deduct or take into account any amounts due by the depositor to that failed bank, such as amounts due in respect to loans and overdrafts.

14.2.4 Financial Institutions

The Financial Institutions Act (Chapter 376 of the laws of Malta, hereinafter referred to as the "Financial Institutions Act") regulates non-bank financial institutions, namely, institutions which do not fund their activities through the taking of deposits. The activities which may be undertaken by financial institutions include lending, financial leasing, venture or risk capital, payment services, issuing and administering means of payment, underwriting share issues and the participation in such issues and others, money broking and issuing of electronic money. Financial institutions are subject to licensing and supervision by the MFSA.

14.2.5 Basic Licence Conditions

Obtaining a licence under the Banking Act or the Financial Institutions Act broadly involves satisfying, inter alia, the following requirements:

(i) submission of the requisite application for authorisation and the required documentation and information;

(ii) having own funds, whether in Euro or in another currency acceptable to the MFSA, which amount to not less than Euro 5,000,000 (in relation to credit institutions) or such other amount as may be established by the MFSA (in the case of financial institutions, the amount of own funds is established by the MFSA);

(iii) at least 2 individuals must effectively direct the licensed entity's business in Malta;

(iv) all qualifying shareholders, controllers and all persons effectively directing the business are to be suitable persons to ensure the sound and prudent management of the business.

The MFSA (jointly with the ECB in the case of banks) is bound to determine an application for a licence within 6 months (3 months in the case of a financial institution) of receipt of an application (but subject to receipt of such additional information as may be requested by the MFSA throughout the application process). In any event, an application must be determined within 12 months of its receipt (6 months in the case of a financial institution).

Licensed banks and financial institutions must at all times comply with the conditions of the particular licence and the regulator also has extensive rights to request information and to carry out inspections for regulatory purposes.

14.2.6 Payment Institutions and Electronic Money Institutions

The Payment Services Directive (Directive 2007/64/EC) was transposed into Maltese law by means of, inter alia, the Financial Institutions Act. This resulted in the introduction of payment institutions being recognised and regulated under the Financial Institutions Act.

Payment institutions may engage in activities such as providing services enabling cash to be placed on a payment account, as well as all the operations required for operating a payment account, execution of payment transactions, issuing and/or acquiring of payment instruments and money remittance.

The concept of "electronic money institutions", namely an institution, other than a bank, which issues means of payment in the form of electronic money also falls to be governed by the Financial Institutions Act following recent amendments to legislation.

14.3 Fintech and Blockchain Technology

To date there are about 40 entities providing payment services and/ or issuing electronic money in or from Malta. It is often held that these payment institutions and electronic money institutions have been the forerunners of fintech companies in Malta. As a jurisdiction, Malta manages to combine the expertise of an international financial services centre with the existing technological knowledge in various ICT sectors and other industries, such as the online gaming industry, which is heavily dependent on technological knowledge.

Over the past year, Malta has witnessed the emergence of a number of new players on the market such as crowdfunding platforms, virtual currency issuers, virtual currency exchange platforms and many others. Initial coin offerings and initial token offerings (commonly referred to ICOs/ ITOs respectively) have also been on the rise as many entities have been utilising blockchain technology as a medium to raise finance.

Since most of these entities are start-ups, GANADO Advocates has set up its own initiative, Project ANEW, which assists a number of start-ups especially within the fintech and blockchain space.

The government of Malta has also utilised blockchain technology to issue education certificates. This is one of many initiatives which the government of Malta has embarked on as part of its mission to establish Malta as a global capital of blockchain expertise.

14.4 Investment Services

The Investment Services Act (Chapter 370 of the laws of Malta, hereinafter at times referred to as the "ISA") provides for a regulatory regime for investment services providers. Reflecting applicable EU legislation (including Directive on Markets in Financial Instruments (recast) (Directive 2014/65/EU) which is also referred to as "MiFID 2"), the ISA sets the parameters for a licensing regime for persons acting from or in Malta as principals or agents, managing investments, acting as trustees,

custodians (depositories) or nominees or providing investment advice in relation to the following:

(i) any "*investment instrument*", including securities, units in collective investment schemes, options, warrants, futures, and contracts of differences; or

(ii) any scheme or arrangement involving an investment instrument; or

(iii) any collective investment scheme, whether of a retail nature or otherwise.

Licence applications are considered on a case by case basis by the MFSA which is the regulator of all financial services business in Malta and is also responsible for investment services regulation and the regulation of collective investment schemes (please see Section 14.5 below for an overview of the regulation of funds and their service providers in Malta). The MFSA has issued extensive Investment Services Rules (the "IS Rules") which, among other things, provide details on the application procedure to be followed by applicants for investment services licences and establish the own funds and liquidity requirements for licence holders depending on which licence category is applicable to the particular applicant. The IS Rules also provide for detailed conduct of business rules to be complied with by licence holders who must also comply with a number of other on-going obligations. In terms of the IS Rules and the ISA, the MFSA enjoys extensive rights to request information from licence holders and to carry out inspections and compliance visits at the premises where the investment service is being offered by the particular licence holder.

The MFSA would have to be satisfied that the prospective licence holder is a "*fit and proper person*" to provide the particular investment services for which he is seeking a licence and that the applicant will have appropriate systems in place in order to comply with and observe the appropriate rules and regulations.

In this context, the MFSA would also require information on the track record of the applicant. The IS Rules mention 3 criteria which should be met in satisfaction of the "*fit and proper test*":

(i) *Integrity*: the applicant and its employees must act honestly and in a trustworthy manner in relation to their clients and other third parties;

(ii) *Competence*: the persons carrying out the activities of the applicant must act in a knowledgeable, professional and efficient way, in compliance with regulations. MFSA would look at the procedures, controls and record keeping facilities of the applicant; and

(iii) *Solvency*: this entails that the business is subject to proper financial control and management and that the applicant satisfies financial resources requirements.

Presence in Malta is mandatory. Furthermore, the "*four-eyes principle*" necessitates at least 2 officers or employees of the licence holder to monitor its operations on an on-going basis.

These individuals need not be directors of the licence holder but must have a certain amount of managerial responsibility. The licence holder would also have to appoint a Compliance Officer and a Money Laundering Reporting Officer.

Unless an exemption applies, an investment services licence is required whether the investment service is being provided in Malta or overseas. Such license is necessary irrespective of the nature of the person or entity providing such investment services where:

- the investment service is provided in Malta by an overseas or a local firm; or
- the investment service is provided overseas by an entity constituted under the laws of Malta.

In terms of the *European Passport Right for Investment Firms Regulations* (hereinafter the "Passport Regulations"), a European investment firm (the "EIF") seeking to establish a branch in Malta, or to provide services in Malta, in the exercise of a European right (that is essentially the freedom of establishment and the free movement of services as enshrined in the Treaty of Rome consolidated in the Treaty on the Functioning of the European Union) must satisfy the establishment requirements, or the service conditions (as the case may be) listed in the said Passport Regulations and will be exempt from the requirement of applying with the MFSA for a licence to provide such services in or from within Malta. An EIF passporting its services into Malta by establishing a branch in Malta is still bound to comply with the conduct of business rules issued by the MFSA as part of the IS Rules.

Furthermore, an investment services firm which is licensed in Malta by the MFSA may avail itself of its passporting rights under both the ISA and the Passport Regulations and offer its services in other EU Member States.

14.5 Investment Funds

Malta is widely considered as a competitive alternative to other EU fund domiciles. Indeed, since 2013 Malta has increasingly featured at the top of ranking tables in influential hedge fund publications as the most favoured EU fund domicile, particularly for fund management companies and start-up funds. Although Malta's competitive offering has broad appeal, fund managers and start-up funds particularly appreciate Malta's reasonable establishment and ongoing costs, accessible and well regarded regulator, skilful and multilingual workforce, and its first class infrastructure.

14.5.1 The regulatory regime for funds

The Maltese regulatory regime for collective investment schemes ("CIS") is governed by the ISA which defines the concept of "collective investment scheme" under Maltese law as well as imposes a licensing requirement for CISs and their service providers. The ISA also transposes relevant EU legislation in relation to investment funds and their service providers such as the EU Directive on undertakings for collective investment in transferable securities (Directive 2009/65/EU as amended by Directive 2014/91/EU, hereinafter referred to as the "UCITS Directive"), the EU Directive on alternative investment fund managers (Directive 2011/61/EU, hereinafter referred to as the "AIFMD"), and the EU Directive on markets in financial instruments (recast) (Directive 2014/65/EU, and hereinafter referred to as "MiFID").

Under the ISA it is an offence for a CIS to:

- issue or create any units or carry on any activity in or from Malta (wherever it may be based); or
- be formed in accordance with or exist under the laws of Malta (even if exclusively issuing or creating units or carrying on activities outside Malta),

without a valid collective investment scheme licence issued by the MFSA.

14.5.2 What is a collective investment scheme?

The ISA defines a CIS as any scheme or arrangement which has as its object or as one of its objects the collective investment of capital acquired by means of an offer of units for subscription, sale or exchange and which has the following characteristics:

- the scheme or arrangement operates according to the principle of risk spreading;

and either:

(i) the contributions of the participants and the profits or income out of which payments are to be made to them are pooled; or

(ii) at the request of the holders, units are or are to be repurchased or redeemed out of the assets of the scheme or arrangement, continuously or in blocks at short intervals; or

(iii) units are, or have been, or will be issued continuously or in blocks at short intervals.

The definition is purposely broad and covers both open-end and closed-end funds, retail and non-retail funds as well as funds where the contributions of investors are not pooled. The definition of a CIS under the ISA also covers alternative investment funds ("AIFs") as defined under the AIFMD, undertakings for collective investment in transferable securities ("UCITS") defined under the UCITS Directive as well as, since pooling is an optional element, funds that fall outside either category.

The definition of a CIS mandates risk spreading. Certain categories of CIS for non-retail investors are, however, exempt from that requirement (being AIFs marketed to professional investors and professional investor funds targeting qualifying or extraordinary investors). See Section 14.5.4 below for more details about such non-retail funds.

By means of regulations issued under the ISA, a number of schemes or arrangements which otherwise could satisfy the definition of a CIS are either expressly exempt from the licensing requirement (such as commercial joint ventures, employee share ownership schemes or family office vehicles – all of which would nevertheless still require a determination in writing by the MFSA that the exemption applies), subject to a less onerous recognition or notification regime (such as private collective investment schemes restricted to a small number of close friends or relatives of the promoters or Notified Alternative Investment Funds), or deemed not to amount to a CIS altogether (such as securitisation vehicles).

Equally, (i) UCITSs that have exercised their marketing right under the UCITS Directive, (ii) EU AIFs managed by an EU Alternative Investment Fund Manager ("AIFM") that has exercised its marketing right under the AIFMD, or (iii) AIFs whose AIFM has completed the appropriate

registration for private placement in Malta, are exempt from the licensing requirement.

An overview of the process for marketing interests in non-Maltese funds in Malta, whether under the marketing passport or by way of private placement is set out in Section 14.5.9 below.

14.5.3 Types of fund vehicle

Since the definition of a CIS under the ISA is neutral as regards a fund's legal form (through the use of the generic expression "*scheme or arrangement*"), promoters are granted significant latitude under Maltese law as to the appropriate legal form for a fund, which will typically depend on the desired tax treatment, investor expectations or other relevant factors. Malta accordingly permits funds to be established as companies, limited partnerships, unit trusts, foundations or mere contractual arrangements.

14.5.3.1 Companies

CISs in Malta are usually established as companies under the Companies Act. Adopting a corporate form means that the CIS is a separate legal entity managed by its board of directors (typically composed of 3 or more directors) and can enter into contracts in its own name. A CIS established as a company may either appoint an external fund manager or be self-managed.

Under the Companies Act, a promoter may establish a CIS as an *INVCO* (investment company with fixed share capital) or a *SICAV* (*société d'investissement à capital variable* or investment company with variable share capital). In addition, the Companies Act requires the promoter to select whether the CIS should be registered as a public liability company or a private limited liability company (though an INVCO can only be established as a public limited liability company). That choice would typically be driven by, among other things, whether the limit of 50 shareholders and the limitations on the transferability and listing of securities issued by private limited liability companies are acceptable. One should here note that a private limited liability company must have restrictions on transfers of its shares (i.e. they cannot be freely transferable) and its securities cannot be admitted to listing or trading according to the Companies Act.

The INVCO is a legal vehicle primarily designed for closed-end fund structures. The INVCO benefits from two main exemptions from the typical strictures of public companies: (a) it is able, provided certain conditions are satisfied, to distribute profits from certain typically undistributable reserves, and (b) it is able to appoint a company as its company secretary. Perhaps understandably, this structure has fallen into disuse in favour of the far more established and flexible SICAV which can, in addition to open-end structures, also adequately serve as a closed-end vehicle.

The SICAV is, by a large margin, Malta's most popular legal form for funds. SICAVs are exempt from the strictures of private and public companies that are inappropriate for funds and accordingly may, among other things, issue and redeem shares continually according to investor demand, issue fractional or discounted shares, and may distribute by way of dividend amounts in excess of the profits and capital which are typically available for distribution by ordinary companies.

Malta has long catered for segregated cell structures (and recently incorporated cell structures) including in areas as diverse as charitable organisations, insurance and securitisation. The SICAV was, however, the first Maltese vehicle to offer these features and is the structure that offers the most flexibility. A SICAV may be established as a multi-class SICAV (that is, a fund with multiple unsegregated classes) or a multi-fund SICAV (that is, an umbrella fund with multiple sub-funds which may or may not have legal segregation between sub-funds). Subject to regulatory constraints, a sub-fund of a multi-fund SICAV may cross-invest into another sub-fund of that SICAV.

Although benefiting from robust and detailed provisions about the legal segregation of sub-funds, sub-funds within a multi-fund SICAV do not have a separate legal personality from the SICAV of which they form part. Promoters, particularly platform operators, wishing to establish an umbrella fund with the highest level of segregation may opt for an incorporated cell company whereby the main company is a multi-fund SICAV which can either create sub-funds (without separate legal personality) or create incorporated cells each of which is a multi-class SICAV company in its own right. A more recent innovation in this area is the recognised incorporated cell company which is an ordinary private or public company whose activity is restricted to providing administrative services to its incorporated cells and which can create incorporated cells each of which may be a multi-class or a multi-fund SICAV company.

In addition to the incorporation of new companies under Maltese law, each of the ISA and the Companies Act permit the migration or redomiciliation of funds in the form of a body corporate into and out of Malta.

14.5.3.2 Limited Partnerships

A limited partnership, or partnership *en commandite*, can have its capital divided into interests or shares and be licensed as a CIS under the ISA. Limited partnerships which are established as funds will have objects limited to the collective investment of funds in securities and other property, with the partners benefiting from the proceeds of the management of those funds. Limited partnerships expressly set up as and licensed as a CIS are regulated by the Tenth Schedule to the Companies Act.

A limited partnership may be formed by two or more partners, with at least one general partner and one limited partner, as is typical in common law jurisdictions. Unlike conventional common law limited partnerships, however, a Maltese law limited partnership has a separate legal personality distinct from that of its partners, and accordingly can transact business and own assets in its own name.

Any person (including a limited liability company) can be a partner (general or limited) in a limited partnership, regardless of where it is resident. The limited partnership itself, however, must have a registered office in Malta.

A general partner of a Maltese limited partnership is jointly and severally liable (with any other general partners of that limited partnership) for all debts of that limited partnership without limitation. The liability of the general partners is, however, subordinate to that of the limited partnership itself, so that the assets of the limited partnership must be exhausted before any action can be taken against a general partner. Limited partners are not liable for any debts of the limited partnership beyond the amount so contributed or agreed to be contributed and not yet paid.

Like the SICAV, a limited partnership may be established as a multi-class limited partnership (that is, a fund with multiple unsegregated classes) or a multi-fund limited partnership (that is, an umbrella fund with multiple sub-funds with a choice as to whether or not to have legal segregation between the sub-funds).

14.5.3.3 Unit trusts

A CIS may be constituted as a trust, and the Trusts and Trustees Act (Chapter 331 of the laws of Malta, hereinafter at times also referred to as the "Trusts Act") and the ISA contain provisions which permit a unit trust arrangement to operate much the same way as a SICAV.

Maltese trust law, notably the Trusts Act, is based on English common law principles and it also has contract-like flexibility which is expressly provided for at law. As is typical with ordinary Maltese trusts, a CIS which is structured as a unit trust will not have legal personality separate from that of its trustee; however, the assets of the trust will constitute a separate, distinct estate to that of the trustee. Unit trusts along with other "commercial transactions" (which term includes CIS) are exempt from many of the formal requirements under the Trusts Act instead leaving these requirements to be regulated by the trust deed.

A unit trust is constituted by an instrument of trust usually between the investment manager and the trustee. The trust instrument will govern matters such as the appointment and retirement of the investment manager and the trustee (the two main functionaries), their respective powers and duties as well as how the trust will operate.

Both foreign trusts and foreign trustees are recognised in Malta, but trustees carrying on business in Malta would need to be approved by the MFSA.

14.5.3.4 Foundations

It is possible for a CIS to take the form of a foundation, which is an organisation that comprises a "*universality of things*" constituted by a founder for: (i) the fulfilment of a specified purpose, or (ii) the benefit of a named person or class of persons, and whose assets are administered by a designated person.

Foundations can be used to further any legitimate business or activity, however, unlike trusts, are granted legal personality by statute. Typically, a foundation would have a finite existence, but when used for collective investment purposes there is no limit on its life.

14.5.3.5 Contractual Funds

A CIS can be established by a "*deed of constitution*" (i.e. a contract) between an investment manager and a custodian. Contractual funds will not have legal personality, can be open-end or closed-end, and the interests in the fund can be divided into units, title to which will be evidenced by certificates or contract notes issued jointly by the investment manager and the custodian.

A contractual fund can be a single fund or an umbrella fund, with separate strategies or different investors housed across sub-funds, as in the case for SICAVs.

14.5.4 Types of authorisations for funds

From a regulatory standpoint, CISs in Malta can be categorised into two main types:

(i) UCITSs authorised under the UCITS Directive, and

(ii) AIFs as defined under the AIFMD.

In addition, as noted above, since the definition of a CIS under Maltese law is broader than those two types, there is a third category of non-EU harmonised CISs that can be established in Malta.

Malta presently offers fund promoters a plethora of regulatory regimes under which to authorise and operate their investment vehicles, each with their own benefits and features.

The MFSA is in the process of finalising a fund regime consolidation exercise, pursuant to a Circular to the Financial Services Industry on the Consolidation of the Maltese Fund Frameworks which was published on the 26 May 2016 (the "MFSA's Fund Regime Consolidation Exercise"), so the main features of the current regime and the proposed regime are described below. The following table summarises the regimes available:

Fund Type	Eligible Investors	Minimum Investment
UCITS	Any	None
Retail Non-UCITS (being phased out)	Any	None
Retail Alternative Investment Fund	Any	None
Alternative Investment Fund or Notified Alternative Investment Fund	Professional Clients under MiFID	None
Alternative Investment Fund or Professional Investor Fund targeting Experienced Investors (being phased out)	Experienced Investors including Professional Clients under MiFID	10,000 (or equivalent)
Alternative Investment Fund, Notified Alternative Investment Fund or Professional Investor Fund targeting Qualifying Investors	Qualifying Investors	75,000 (or equivalent) (to be increased to 100,000)
Alternative Investment Fund or Professional Investor Fund targeting Extraordinary Investors (being phased out)	Extraordinary Investors	750,000 (or equivalent)
Loan Fund	Professional Clients under MiFID	100,000 (or equivalent)

14.5.4.1 Retail Investors (UCITS, Retail Non-UCITS and Retail AIFs)

A CIS which is available for distribution to retail clients (and which in accordance with MiFID, refers to clients who do not qualify as professional clients, hereinafter referred to as "Retail Investors") may be authorised as: (a) a UCITS, (b) a Retail Non-UCITS, or (c) a Retail AIF, each of which has its own dedicated MFSA Rulebook. Each fund may be externally managed or, if additional requirements are complied with, self-managed.

a. UCITS

The UCITS is the EU-harmonised retail investment fund structure and is accordingly subject to detailed requirements including in relation to eligible investments, diversification requirements and other investment restrictions. Malta has recently seen a resurgence of UCITS being established, and the number of UCITS authorised in Malta has almost doubled since 2010. This is primarily as a result of promoters and fund managers actively seeking out jurisdictions within the EU, such as Malta, which offer lower establishment and operating costs for what is essentially a harmonised fund product.

b. Retail Non-UCITS

As a non-harmonised retail fund-type, the Retail Non-UCITS has increasingly fallen into disuse in Malta with promoters instead opting for the more established and easier to distribute UCITS. Additionally, following the transposition of the AIFMD into Maltese law a Retail Non-UCITS qualifies as an AIF and accordingly the AIFM will, if within AIFMD's scope, need to comply with the AIFMD without the benefit of a passport to market to the Retail Investors which this type of fund was originally designed for. As part of the MFSA's Fund Regime Consolidation Exercise, the MFSA with effect from 3 June 2016 no longer accepts new

applications for Retail Non-UCITS, so this regime will gradually be phased out.

Retail Non-UCITS are subject to a number of UCITS-like investment restrictions, including limits on eligible assets, diversification requirements, and counterparty exposure limits as well as local restrictions such as a prohibition on sub-funds of umbrella funds cross-investing into another sub-fund of that same umbrella fund. Retail Non-UCITS are, in certain respects, subject to more onerous investment restrictions than UCITS such as outright prohibitions on the use of financial derivatives for investment purposes and leverage. Unlike UCITS, a Retail Non-UCITS could, however, be established as a closed-end CIS.

c. Retail AIFs

As part of Malta's transposition of the AIFMD, the MFSA created a new type of fund for EU AIFMs, the aptly named "Alternative Investment Fund" (hereinafter the "AI Fund") (described below in Section 14.5.4.2). In recognition of the flexibility afforded by Article 43 of AIFMD for EU member States to permit the marketing of AIFs to Retail Investors, the AI Fund may also be authorised as a "Retail AIF".

Retail AIFs are subject to similar investment restrictions to Retail Non-UCITSs and can be established as closed-end CISs. A Retail AIF may only be managed by a Maltese or EU authorised AIFM and will be subject to a number of licensing conditions designed to reflect the AIFM's duties under AIFMD.

14.5.4.2 Professional Investors and HNWIs (PIFs and AIFs)

A CIS which is available for distribution to professional clients (as defined under MiFID, and hereinafter referred to as "Professional Investors") may be authorised as:

A. a Professional Investor Fund ("PIF"); or

B. an AI Fund, each of which has its own dedicated MFSA Rulebook.

Each of these funds may be externally managed or self-managed.

Additionally, EU AIFMs have a third option, the (C) Notified Alternative Investment Fund ("NAIF"), which is an AIF under the AIFMD, which is not authorised by the MFSA, but whose existence must merely be notified to MFSA.

A. PROFESSIONAL INVESTOR FUNDS

Malta's flagship non-retail fund regime, the PIF, was retained largely unaltered following the implementation of the AIFMD. A PIF may be structured as an AIF or otherwise, as an open-ended or closed-ended CIS, may have a single or multiple custodians (or none at all, with prime brokers carrying out safekeeping), may appoint service providers based outside Malta (ideally based in a recognised jurisdiction, i.e. any EU jurisdiction or a jurisdiction with whose competent authority the MFSA has a relevant multi-lateral or bilateral memorandum of understanding in place), do not require local directors, may pursue any investment strategy and are subject to little or no investment restrictions.

PIFs are also subject to a "fast-track" processing commitment by the MFSA. If the PIF is externally managed and all service providers are based and regulated in recognised jurisdictions, the MFSA is committed to review the application form and supporting documents and provide its comments to the applicant within: (a) seven business days from receipt of an application for a PIF targeting experienced or qualifying investors, or (b) 3 business days from receipt of an application for a PIF targeting extraordinary investors.

The rules applicable to a PIF will depend on two main factors: (a) the location and type of AIFM which that PIF appoints, and (b) the type of investors which it is authorised to target.

Location and Type of AIFM – a PIF may appoint:

- a de minimis AIFM (that is, an AIFM below the thresholds set out in Article 3(2) of the AIFMD (the "AuM Thresholds") and which amount to (i) 100m or (ii) 500m if unleveraged and investors have no redemption rights exercisable during a period of 5 years from the date of initial investment in the fund); or
- a non-EU AIFM as its external fund manager.

Additionally, a PIF may be a self-managed PIF provided that it expects to remain below the AuM Thresholds (if a self-managed PIF is expected to exceed these thresholds it will need to restructure and probably apply for authorisation as an AI Fund or appoint an external AIFM).

Where a PIF appoints a full-scope EU AIFM and qualifies as an AIF, the AIFM will need to ensure in accordance with the AIFMD, among other things, that the PIF appoints a single custodian which is established in Malta, the offering documentation contains appropriate disclosures and that it or an external valuer retains responsibility for the valuation of the AIF's assets. In all other cases the PIF (and the AIFM) only needs to comply with the MFSA's PIF Rulebook. The position for full-scope

non-EU AIFMs may be subject to change once the AIFMD's third-country regime comes into effect.

Type of Investors Targeted – PIFs fall into different categories depending on the type of investors targeted, ranging from quasi-retail to ultra-high net worth or institutional investors which will, in turn, dictate the level of minimum investment required, the applicable investment restrictions and various other requirements. There are essentially 3 investor categories:

Experienced Investors – A PIF targeting Experienced Investors (an "ExpIF") is subject to the lowest minimum investment requirement (10,000 or its equivalent in any other currency) and is subject to the most onerous requirements including detailed investment restrictions and limits (over and above those which are self-imposed).

The MFSA's PIF Rulebook defines an Experienced Investor as "a person having the expertise, experience and knowledge to be in a position to make his own investment decisions and understand the risks involved". An investor in such a PIF must state the basis on which he satisfies this definition, either by confirming relevant work experience, reasonable experience investing in the type of assets invested in by that PIF, particular volumes and frequencies of investments or by providing any other appropriate justification. A person qualifying as a "Professional client" under MiFID automatically qualifies as an Experienced Investor.

Among other things, an ExpIF:

(i) may not borrow or employ leverage for investment purposes in excess of 100% of its net asset value ("NAV");

(ii) must comply with the principle of risk spreading as well as adhere to the diversification requirements in the MFSA PIF Rulebook (such as restrictions on exposure to any one counterparty, credit institution or issuer as well as a minimum number of funds in which an ExpIF which is a fund of funds must invest);

(iii) may not, where the ExpIF is established as an umbrella fund, cross-invest into another sub-fund of that same umbrella fund (similar to the retail categories above); and

(iv) must appoint a single custodian with both a safekeeping as well as a monitoring and oversight role.

As part of the MFSA's Fund Regime Consolidation Exercise, this category is being phased out, so that the MFSA does not accept new applications for ExpIFs with effect on and from 3 June 2016.

Qualifying Investors – A PIF targeting Qualifying Investors (a "QIF") is subject to a medium minimum investment requirement (75,000 or its equivalent in any other currency) and is generally not subject to any investment restrictions (other than those which are self-imposed; the sole investment restriction imposed on QIFs is in relation to the use of leverage (a limit of 50% of NAV) where the QIF invests in real estate). In addition, a QIF:

(i) is not required to comply with the principle of risk spreading;

(ii) can, if the QIF is established as an umbrella fund with segregated sub-funds, cross-invest into another sub-fund of that same umbrella fund up to a limit of 50% of NAV in any one other sub-fund (can invest up to 100% of NAV in the aggregate); and

(iii) can have multiple custodians or none at all if the MFSA is satisfied that there are alternative safekeeping arrangements (such as through the use of prime brokers). There is no requirement for the custodians or prime brokers to carry out a monitoring and oversight role (though if the QIF is managed by an EU AIFM, the AIFM would need to ensure that these are implemented in order to comply with its obligations under AIFMD).

The QIF is being retained following the MFSA's Fund Regime Consolidation Exercise with an increased minimum investment requirement of 100,000 or its equivalent in any other currency.

The MFSA's PIF Rulebook defines a *Qualifying Investor* as a person who meets one or more of the following criteria:

(i) a body corporate which has (or which is part of a group which has) net assets in excess of 750,000 (or its equivalent in any other currency);

(ii) an unincorporated body of persons or association, a trust or an individual (alone or together with his or her spouse) which has net assets in excess of 750,000 (or its equivalent in any other currency);

(iii) an individual or, in the case of a body corporate, the majority of its board of directors or general partner (as applicable), who has reasonable experience in the acquisition and/or disposal of funds of a similar nature or risk profile or property of

the same kind as the property, or a substantial part of the property, to which the PIF in question relates;

(iv) a senior employee or director of service providers to the PIF;

(v) a relation or close friend of the promoters limited to a total of 10 persons per PIF;

(vi) an entity with (or which are part of a group with) 3.75 million (or equivalent) or more under discretionary management, investing on its own account;

(vii) the investor qualifies as a QIF or an ExtraIF; or

(viii) a special purpose vehicle wholly owned by persons or entities satisfying any of the other criteria listed above.

The MFSA's Fund Regime Consolidation Exercise will, once complete, replace the definition of *Qualifying Investor* such that it covers any one of:

(i) a body corporate which has net assets in excess of 750,000 or which is part of a group which has net assets in excess of 750,000 or, in each case, the equivalent in any other currency;

(ii) an unincorporated body of persons or association which has net assets in excess of 750,000 or the equivalent in any other currency;

(iii) a trust where the net value of the trust's assets is in excess of 750,000 or the equivalent in any other currency;

(iv) an individual whose net worth or joint net worth with that of the person's spouse, exceeds 750,000 or the equivalent in any other currency; or

(v) a senior employee or director of a service provider to the PIF.

Extraordinary Investors – A PIF targeting Extraordinary Investors (an "ExtraIF") is subject to the highest minimum investment requirement (750,000 or its equivalent in any other currency) but is subject to the lowest level of supervision, including no investment restrictions (other than those which are self-imposed). An ExtraIF has the same features as a QIF (as outlined above) and in addition:

- does not need a formal offering document and can issue a brief marketing document; and
- need simply notify the MFSA of changes to the offering document or marketing document as well as to service providers (such as custodian(s), manager, administrator or advisers) (rather than seeking the MFSA's prior approval).

The MFSA's PIF Rulebook defines an *Extraordinary Investor* as a person who meets one or more of the following criteria:

(i) a body corporate which has (or or which is part of a group which has) net assets in excess of 7.5 million or equivalent in any other currency;

(ii) an unincorporated body of persons or association, a trust or an individual (alone or together with his or her spouse) which has net assets in excess of that amount;

(iii) a senior employee or director of service providers to the PIF;

(iv) the investor qualifies as an ExtraIF; or

(v) an SPV wholly owned by persons or entities satisfying any of the other criteria listed above.

As part of the MFSA's Fund Regime Consolidation Exercise, this category is also being phased out, so that the MFSA no longer accepts new applications for ExtraIFs with effect on and from 3 June 2016.

Of the 3 categories, the QIF is by far the most popular since promoters find that it strikes a good balance between the type of investor that may be targeted and the minimum investment level, on the one hand, and regulatory requirements on the other. Indeed, the MFSA's Fund Regime Consolidation Exercise means that, with effect from 3 June 2016, the QIF is the only available option for applicants, thereby gradually phasing out the ExpIF and the ExtraIF.

All PIFs need to appoint an AIFM (unless they are self-managed), a compliance officer, a money laundering reporting officer and a statutory auditor. Where the PIF does not appoint an administrator the AIFM would be required to assume that role. PIFs set up in corporate form are expected to have at least 3 directors one of whom should be independent. There are no residency requirements for directors of a PIF (unless that PIF is self-managed), however, if all directors and service providers are resident outside Malta that PIF will

need to appoint a local representative to act as a point of liaison with the MFSA.

B. ALTERNATIVE INVESTOR FUNDS

As noted above, as part of Malta's transposition of the AIFMD, the "*Alternative Investment Fund*" was added as a new type of fund alongside the PIF. The AI Fund is designed for full-scope EU AIFMs seeking a regulated type of fund as well as for self-managed AIFs that exceed the AuM Thresholds.

In order to support full-scope EU AIFMs in ensuring that the AIFs which they manage satisfy and continue to satisfy the requirements under the AIFMD, the licensing conditions for AI Funds mirror the requirements which apply to EU AIFMs in relation to the AIFs that they manage. Accordingly an AIF Fund must appoint a single full-scope EU AIFM (or be self-managed), appoint a single custodian satisfying the requirements of Article 21 of the AIFMD, must ensure that its offering documents include the disclosures required under Article 23 of the AIFMD and must ensure that the AIFM or a duly appointed external valuer is responsible for the valuation of the assets of the AIF.

With the exception of the Retail AIF described above, all AI Funds may be marketed to (under the AIFMD), and accept subscriptions from, Professional Investors. An AI Fund which is available to Professional Investors is not subject to any minimum investment requirements or investment restrictions. Since the definition of Professional Investor reflects that under MiFID, subscriptions (even if based on reverse solicitation) from non-'per se' Professional Investors such as ultra high net worth individuals, local authorities or medium sized companies cannot be accepted unless such investors elect to and are eligible to be treated as elective Professional Investors.

Similarly to a PIF, an AI Fund may by imposing a minimum investment amount and certain investment restrictions (where applicable) opt to be authorised as an AI Fund available to a slightly broader category of investors:

- *Experienced Investors* – An AI Fund which is available to Experienced Investors is subject to the same minimum investment requirement (10,000 or its equivalent in any other currency) and investment restrictions including leverage restrictions as an ExpIF (see "*Professional Investor Funds*" above) (this category is being phased out with no new applications accepted since 3 June 2016).
- *Qualifying Investors* – An AI Fund which is available to Qualifying Investors is subject to the same minimum investment requirement (75,000 or its equivalent in any other currency) as a QIF (see "*Professional Investor Funds*" above). An AI Fund targeting Qualifying Investors is also not subject to any investment restrictions other than in relation to real estate.
- *Extraordinary Investors* – An AI Fund which is available to Extraordinary Investors is subject to the same minimum investment requirement (750,000 or its equivalent in any other currency) as an ExtraIF (see "*Professional Investor Funds*" above). Unlike the ExtraIF above, an AI Fund which is available to Extraordinary Investors does not benefit from additional derogations from the MFSA's AIF Rulebook beyond the lack of investment restrictions (this category is being phased out with no new applications accepted since 3 June 2016).

An AI Fund opting to be available to investors other than "*Professional Investors*" should ensure that it either complies with the Investment Services Act (Prospectus of Collective Investment Schemes) Regulations (Subsidiary Legislation 370.04 of the laws of Malta) or ensures that it is suitably exempt. These rules, which partially implement the EU Prospectus Directive and are normally of relevance to retail funds, apply where a CIS, other than a PIF, makes an offer of its securities to the public.

The MFSA's Fund Regime Consolidation Exercise will, once complete, cause the minimum investment for Qualifying Investors (with the new definition as noted under "*Professional Investor Funds*" above) to increase to 100,000 or its equivalent in any other currency.

Again similarly to a PIF, an AI Fund must appoint, besides a single AIFM and custodian, a compliance officer, a money laundering reporting officer and a statutory auditor. An AI Fund which is established in corporate form is expected to have at least 3 directors, at least one of whom should be independent. There are also no residency requirements for the directors of an AI Fund (unless that AI Fund is self-managed).

C. NOTIFIED ALTERNATIVE INVESTMENT FUNDS

A relatively recent introduction, the NAIF offers full-scope EU AIFMs a fund vehicle that qualifies as an AIF under the AIFMD and can be launched within 10 working days from notification to the MFSA. Unlike the AI Fund described above, the NAIF is restricted to particular structures and strategies and is not authorised by the MFSA but

notified by the AIFM to MFSA. A NAIF is not regulated by the MFSA but rather it is the AIFM that assumes responsibility to comply with the MFSA's requirements.

A NAIF must be managed by a full-scope EU AIFM authorised and regulated under the AIFMD which must hold all of the voting rights in the NAIF. Thus non-EU AIFMs may not establish NAIFs, at least until third country passport rights are granted under the AIFMD. The NAIF regime may not be availed of by AIFs which: (a) are self-managed, (b) are loan funds and are authorised to invest through loans (see Section 14.5.4.3 below), (c) have as their main objective investing in immovable property, directly or indirectly, or (d) invest in non-financial assets.

A NAIF may be made available to Professional Investors or Qualifying Investors (see above) subject to a minimum investment of 100,000 or its equivalent in any other currency.

14.5.4.3 Funds with specific investment strategies

Whilst the regimes which govern PIFs, AI Funds and NAIFs have historically been investment strategy neutral, the MFSA has recently issued dedicated rulebooks or supplementary licence conditions for funds pursuing particular strategies. To-date the MFSA has issued additional guidance on PIFs or AI Funds seeking to be authorised as: (a) Money Market Funds, (b) Short Term Money Market Funds, or (c) Lending Funds (loan origination or loan acquisition), each with specific investment restrictions, diversification and eligibility criteria.

PIFs, AI Funds or NAIFs may be used to structure particular EU AIFs such as the EU Venture Capital Fund or EU Social Entrepreneurship Fund.

14.5.4.4 Private Collective Investment Schemes

As mentioned above, the ISA contemplates the "*recognition*" (a type of authorisation) of private collective investment schemes which are a particular investment vehicle restricted to not more than 15 individuals who must all be close friends or relatives of the promoters. Since this type of fund is limited in scope and is not generally treated as a CIS including for tax purposes (it is not authorised but recognised by the MFSA) this vehicle is rarely used.

14.5.5 The Authorisation Process

The MFSA operates a streamlined, if somewhat document intensive, application process for the authorisation process for CIS which depends on the applicable regulatory regime opted for. The process involves submission of due diligence documentation on proposed directors, service providers and any founding shareholders; draft agreements and offering documentation; as well as generally an indication as to how the relevant authorisation requirements have been satisfied. The process generally can, depending on the complexity or novelty of the structure as well as whether parties are already known to the MFSA, be expected to last between 3 to 5 months.

Solely in relation to NAIFs, the application process is replaced by a notification process under which the AIFM submits a notification pack to the MFSA, which pack would include the final offering documents approved by the governing body of the NAIF (the notification must be made within 30 calendar days from the date of adoption by the NAIF's governing body of the relevant offering documents). Provided that the notification pack is complete and in compliance with the MFSA's requirements, the MFSA must include the NAIF on the official list of NAIFs within 10 working days from notification.

14.5.6 Service Providers and Corporate Governance

14.5.6.1 Fund Managers / AIFMs

A CIS under Maltese law may be externally managed or, if it adopts a corporate structure, be authorised as a self-managed CIS.

If the fund manager or AIFM is established in Malta it will need to hold a Category 2 licence issued under the ISA, the requirements for which depend on whether the fund manager will qualify as a UCITS Management Company (that is, a fund manager that can manage UCITSs), a *de minimis* AIFM (that is, an AIFM whose AIF assets under management are below the AuM Thresholds) or a full scope AIFM (that is, an AIFM whose AIF assets under management exceed the AuM Thresholds and accordingly subject to the AIFMD).

If the fund manager or AIFM is established in another EU member State and qualifies as a UCITS Management Company or a full scope AIFM (relevant to UCITS, AI Funds or NAIFs in particular), it will need to first exercise its management passport under the relevant EU Directive.

If on the other hand, the fund manager or AIFM is established outside the EU or qualifies as a *de minimis* AIFM (mainly relevant to Retail Non-UCITS and PIFs) that fund manager is, provided that the MFSA is generally satisfied that the fund manager is adequately regulated in its country of residence and is of sufficient standing and repute, exempt from authorisation by the MFSA. This assessment

would be carried out as part of the application for authorisation of the CIS.

If the CIS is to be established as a self-managed CIS it would generally be required to have at least 1 locally resident director, establish an investment committee composed of not less than 3 persons with verifiable competence in portfolio management and, for AI Funds, NAIFs and UCITS will need to have hierarchically segregated risk and valuation functions. A self-managed CIS may, subject to the rules applying to particular types of funds, delegate portfolio management or risk management to third parties acceptable to the MFSA.

14.5.6.2 Investment Advisers

Similar considerations, as above for AIFMs, apply to investment advisers appointed by the CIS. If the investment adviser is established outside Malta, it is, provided that the MFSA is generally satisfied that it is adequately regulated in its country of residence and is of sufficient standing and repute, exempt from authorisation by the MFSA. Again, this assessment would be carried out as part of the application for authorisation of the CIS.

14.5.6.3 Fund Administrators

A CIS (or its AIFM on its behalf) may: (a) appoint an external fund administrator to provide fund administration services such as the calculation of its NAV, fund accounting or transfer agency; (b) appoint the AIFM or the fund manager to provide those services; or (c) if self-managed may provide those services internally.

If the person (be it the external administrator, the AIFM or fund manager or the self-managed CIS itself) is established in Malta it will need to hold a "*recognition certificate*" issued by the MFSA.

Although most major administrators have set up operations in Malta, Maltese CIS of any type are, unlike many other jurisdictions, not required to appoint a Maltese administrator. An administrator established outside Malta is, provided that the MFSA is generally satisfied that the administrator is adequately regulated in its country of residence and is of sufficient standing and repute, exempt from authorisation by the MFSA. This assessment would, as for non-EU AIFMs, be carried out as part of the application for authorisation of the CIS.

14.5.6.4 Trustees and Depositaries of CIS

Generally a Maltese CIS (including UCITS, Retail Non-UCITS, AI Funds and NAIFs) needs to appoint a Maltese custodian, though ExpIFs, QIFs or ExtraIFs are not required to appoint a Maltese custodian and can appoint a custodian established outside Malta.

If the custodian is established in Malta it must hold a Category 4a licence issued under the ISA. Broadly, only credit institutions, certain investment services firms with not less than 730,000 in own funds, or branches or subsidiaries of such entities are eligible to apply for a Category 4a licence. Alternatively if the CIS has no redemption rights during a period of 5 years from the date of initial investment in the fund and generally invests in assets that do not need to be held in custody under the AIFMD, it can appoint a custodian in possession of a Category 4b licence (known as "*depositary lite*"). The eligibility criteria for a Category 4b licence are wider and include, in addition to investment services firms, any fund administrator which has own funds of not less than 125,000.

A custodian for PIF which is established outside Malta is, provided that the MFSA is generally satisfied that the custodian is adequately regulated in its country of residence and is of sufficient standing and repute, exempt from authorisation by the MFSA. This assessment would be carried out as part of the application for authorisation of the PIF.

Maltese custodians are permitted to (and most do) delegate safekeeping to a global custodian (and its sub-custody network) or to one or more sub-custodians.

14.5.6.5 Prime Brokers

Maltese CIS may appoint local or foreign prime brokers. Where, as is permitted for QIFs, the prime broker also has a safekeeping role, the MFSA would need to be satisfied that the prime broker is adequately regulated in its country of residence and is of sufficient standing and repute.

14.5.7 Corporate Governance

The MFSA has relatively recently issued a *Corporate Governance Manual for Directors of Collective Investment Schemes* which, to the extent proportionate or applicable, directors of Maltese CIS are expected to abide by.

14.5.8 Listing

Increasingly, both Maltese and foreign funds are seeking either a primary or secondary listing on the Malta Stock Exchange ("MSE"). The MSE is Malta's primary stock exchange and central securities depositary and forms part of the Clearstream settlement network. As listing authority under the Financial Markets Act, the MFSA has issued a dedicated chapter of the listing rules for funds seeking listing on MSE.

In general, a fund seeking a listing must ensure that its units are freely transferable, publish a prospectus or other offering document containing

the disclosures required by the listing rules, must have at least 1 independent director, cannot have corporate directors (unless the corporate director is the AIFM) and must adopt rules governing dealings by directors of the fund in its units. Funds seeking a listing must also appoint a listing sponsor which will, with the fund's legal advisors, support and prepare the fund for admission to listing.

As both the competent authority and listing authority, the MFSA will, if informed at application stage of the fund's intention to seek a listing, typically review the application for admissibility to listing concurrently with the application for authorisation and issue one unified approval.

14.5.9 Marketing

14.5.9.1 Marketing of Maltese funds outside Malta

The ability to market units or shares in Maltese CISs outside Malta depends on a number of factors including the type of fund, the type and place of establishment of the AIFM, whether the countries targeted are in or outside the EU, and the type or types of investors targeted. In addition, the local distribution rules in the target country are also relevant.

CISs which are authorised as UCITSs benefit from an EU passport which enables them to be sold in all EU countries following a notification to that effect to the MFSA. Maltese UCITSs have also been successfully registered for sale in non-EU countries (such as South Africa) though this is subject to local approvals.

The AIFMD introduced a passport for EU AIFMs managing EU AIFs such as AI Funds (including self-managed AI Funds) and NAIFs to market units or shares in those AIFs to investors that qualify as professional clients under MiFID. Similar to the process for UCITS, the process to be followed involves a notification to the "*home*" regulator of the EU AIFM which is then transmitted to the "*host*" EU regulator.

Marketing to other types of investors (such as Retail Investors) or marketing by AIFMs that do not have a passport under the AIFMD (such as *de minimis* AIFMs or non-EU AIFMs) will require compliance with the local distribution or private placement rules (if any) in the relevant country or countries targeted.

14.5.9.2 Marketing of Non-Maltese funds in Malta

The sale of units or shares in EEA UCITS or EEA AIFs managed by an EEA AIFM into Malta is also governed by the EU passport arrangements described above.

Non-Maltese funds which do not benefit from an EU passport will need to adhere to Malta's private placement rules. Following the transposition of AIFMD in Malta, Malta's private placement regime for funds distinguishes between the marketing of UCITS in Malta and the marketing of AIFs in Malta, with the latter mirroring the broader definition of marketing under AIFMD.

The following table summarises the fund marketing options presently available in Malta and their requirements:

Location of AIFM	Location of AIF	Type of Investors	Requirements
EU UCITS Management Company	EU UCITS	Any	▪ Exercise of Marketing Passport under UCITS Directive by UCITS Management Company; and ▪ Payment of the relevant fee (2,500 plus 450 per sub-fund).
EU AIFM	EU AIF (other than a feeder into Non-EU AIF or EU AIF managed by a non-EU AIFM)	Professional Clients	▪ Exercise of Marketing Passport under Article 31 or 32 of AIFMD by AIFM; and ▪ Payment of the relevant fee (2,500 plus 450 per sub-fund).
EU AIFM	Non-EU AIF(including an EU feeder into Non-EU AIF or EU AIF with Non-EU AIFM)	Professional Clients	▪ Compliance with Article 36 of the AIFMD; ▪ Prior notification to the MFSA; and ▪ Payment of the relevant fee (2,500 plus 450 per sub-fund).
De Minimis EU AIFM	EU or Non-EU AIF	Professional Clients	▪ Must be permitted to privately place in other EU Member States under the AIFM's home legislation;

			▪ Compliance with conditions akin to those ir Article 36 of the AIFMD; ▪ Prior notification to the MFSA; and ▪ Payment of the relevant fee (2,500 plus 450 per sub-fund).
Non-EU AIFM	EU or Non-EU AIF	Professional Clients	▪ Compliance with Article 42 of the AIFMD; ▪ Prior notification to the MFSA; and ▪ Payment of the relevant fee (2,500 plus 450 per sub-fund).
Any	Any	Retail Clients	▪ As above (as applicable according to the type and location of the AIFM and the AIF); and ▪ Authorisation by the MFSA (presently it must qualify as a non-complex instrument under MiFID).

CIS registered for marketing in Malta will, depending on their type, be subject to ongoing requirements such as ensuring facilities are available in Malta to provide information to investors, periodic reporting to the MFSA, and payment of an annual supervisory fee.

14.6 Capital Markets

Maltese law implements all relevant EU capital markets legislation, including the MiFID, the Prospectus Directive, the Market Abuse Directive, the Transparency Directive, the Takeover Directive, and the Shareholder Rights Directive.

Malta has 3 "regulated markets" (as defined under MiFID) where securities can be listed:

- The Official List of the Malta Stock Exchange (the "MSE") (www.borzamalta.com.mt);
- The Institutional Financial Securities Market (the "IFSM");
- The European Wholesale Securities Market (the "EWSM") (www.ewsm.eu);

Both equity securities (including units in collective investment schemes) and debt securities (including government bonds and treasury bills) can be listed on the MSE's Official List. The MSE's Official List is traditionally a retail market dominated by domestic corporate bonds and Maltese government debt offerings.

The IFSM (a market segment of the MSE) and the EWSM are markets specifically designed for institutional investors, where the nominal value of each security listed must be at least 100,000.

These markets, which are subject to the Listing Rules for Wholesale Securities Markets, permit the listing of debt securities (including convertible debt), asset-backed securities, and derivative securities.

The MSE also operates "Prospects", a self-regulated multi-lateral trading facility that provides SMEs and other issuers that do not meet the relevant listing conditions of the "regulated markets" with a trading venue to list their equity and/ or debt securities (http://www.smeprospects.com/).

14.7 Securitisation

14.7.1 A robust legal framework for any asset class

Malta's Securitisation Act (Chapter 484 of the laws of Malta, hereinafter referred to as the "Securitisation Act") provides a legal framework for securitisation transactions that has been carefully designed to reflect both the specificities and wide variety of securitisation transactions brought to the market. The Securitisation Act provides statutory solutions and greater certainty of outcomes for many of the legal concerns of investors and credit rating agencies, including true sale, bankruptcy remoteness, and the privileges of securitisation creditors over the vehicle's assets. The structural enhancements afforded to Maltese securitisation vehicles under the Securitisation Act allow for competitive borrowing costs relative to any recognised issuer jurisdiction.

Maltese securitisation vehicles can be used to structure various forms of securitisation transactions and a wide variety asset-classes can be securitised, including credit card receivables, trade receivables, lease/ charter payments for aircraft and ships, insurance risk and income/ royalty streams from intellectual property assets such as copyright, patents and trademarks, to name a few.

14.7.2 Statutory "*true sale*" and bankruptcy remoteness

The Securitisation Act specifically addresses the requirement of "*true sale*" in asset securitisation transactions by providing that a transfer to a securitisation vehicle in accordance with the Securitisation Act is valid and enforceable in accordance with its terms and is not subject to re-characterisation for any reason whatsoever nor is it subject to the claims of the originator's creditors in insolvency or otherwise.

Maltese securitisation vehicles are also bankruptcy remote from the originator by operation of law, with the Securitisation Act expressly providing that no proceedings taken in relation to the originator under any law will have any effect on a securitisation vehicle and its assets.

14.7.3 Investor priority over securitisation assets and winding-up proceedings

Securitisation creditors (predominantly the investors in the securities issued by the securitisation vehicle, but also liquidity providers, hedge counterparties and the like) enjoy the benefit of ranking first with respect to all assets held by the securitisation vehicle, irrespective of the provisions of any other law, which privilege extends to all proceeds derived from the securitisation assets and assets acquired with those proceeds. The subordination of claims between various securitisation creditors, including in the event of insolvency, will also be respected in accordance with the provisions of the Securitisation Act.

Moreover, the Securitisation Act expressly prohibits all persons who are not securitisation creditors from applying to the Court for the issuance or enforcement of any precautionary act or warrant against the securitisation vehicle and its assets, unless it is shown that there has been fraud on the part of the vehicle. It is also possible for the constitutive documents of a securitisation vehicle to give investors (typically through a trustee) the right to demand the vehicle's dissolution, liquidation, winding-up, reconstruction or recovery, to the exclusion of other persons.

14.7.4 Regulatory requirements

Securitisation vehicles are merely required to notify the MFSA of their activities prior to commencement of the same, unless a securitisation vehicle is securitising insurance risk or issuing financial instruments to the public on a continuous basis, in which case it will require prior authorisation by the MFSA.

Maltese securitisation vehicles are otherwise specifically exempt from licensing or authorisation requirements (in Malta) of any kind in respect to any activities in relation to the securitisation transactions they undertake (including under the Investment Services Act, Banking Act or Financial Institutions Act, for example). Of particular relevance to transactions with a managed or dynamic portfolio of assets, the Securitisation Act provides that Maltese securitisation vehicles are not to be considered collective investment schemes, thereby exempting them from the local regulatory regime applicable to collective investment schemes (including the regime for alternative investment funds).

14.7.5 Tax neutrality

Malta has specific rules on the tax treatment of securitisation vehicles that enable them to achieve tax neutrality in respect of the securitisation transactions for which the vehicles are established. These tax rules can be applied to eliminate tax leakage for securitisation vehicles established in Malta and to ensure that there is no Maltese tax liability for originators that are not Malta tax resident.

14.7.6 Securitisation Cell Companies

Maltese securitisation vehicles can also be established as Securitisation Cell Companies ("SCCs"). An SCC is a single legal entity that can create multiple segregated cells for the purpose of undertaking securitisation transactions (i.e. with each cell acting as a distinct special purpose vehicle ("SPV") issuer, albeit without its own legal personality, in the particular transaction for which it has been established). The SCC structure, which offers lower costs and quicker set-up time for each transaction, makes it ideal for asset-based security offering programmes or asset-based financing (or other) platform structures. SCCs have opened up the securitisation market to transactions where the deal amounts are smaller and margins slimmer, with several platform arrangers now offering originators efficient "*plug and play*" solutions.

14.8 Insurance Business

14.8.1 Legal and Regulatory Overview

Malta is a growing insurance market with 60 authorised insurance undertakings as at the end of 2016 writing a total Gross Written Premium of €3.82bn during the same year. EU-wide passporting rights for insurance undertakings, Protected Cell legislation, Reinsurance Special Purpose Vehicle ("RSPV") Regulations, and the country's firm but flexible regulatory approach and cost-effectiveness are Malta's major attractions.

Insurance business in Malta is regulated by two separate but complementary pieces of legislation, the Insurance Business Act (Chapter 403 of the laws of Malta, hereinafter referred to as the "IBA") and the Insurance Intermediaries Act (Chapter 487 of the laws of Malta, hereinafter referred to as the "IIA").

The IBA and the IIA together regulate all operators in the insurance sector (consisting of insurance and reinsurance undertakings including captives, and insurance intermediaries) by imposing an authorisation, enrolment or registration requirement from or with the MFSA.

The IBA and IIA are supplemented by regulations (the "Insurance Regulations") promulgated under and in terms of these two laws, and by detailed rules (the "Insurance Rules") issued by the MFSA. The Insurance Regulations and the Insurance Rules have legislative force for all authorised entities, and provide market participants with a comprehensive set of directives that apply during the application process as well as on an ongoing basis. The regulatory requirements with respect to the treatment of clients will be stipulated by a Conduct of Business Rulebook (the "Rulebook"), which is currently in its final stages of consultation with the market.

The IBA implements the requirements of the Solvency II Directive, while the IIA currently implements the requirements of the Insurance Mediation Directive. Malta shall be adopting the Insurance Distribution Directive (the "IDD") as from the anticipated date of implementation in February 2018 and is currently transposing the IDD requirements into national legislation. To this effect, the IIA will be renamed as the Insurance Distribution Act (the "IDA"), with amendments to the IBA and the supplementary regulations and rules also being expected.

14.8.2 Authorisation

The IBA lays down that the MFSA may grant an authorisation to:

(i) an undertaking whose head office is in Malta to carry on the business of insurance or reinsurance in or from Malta, or in or from a country outside Malta; or

(ii) an undertaking whose head office is in a country outside Malta to carry on the business of insurance or reinsurance in or from Malta.

Applicants may apply for authorisation to carry on insurance business in any class, part class or classes of insurance business set out in Table 1 below.

However, applicants are not allowed to seek authorisation to carry on a combination of both long term and general business unless the general business is restricted to Classes 1 and 2 (Accident and Sickness) or the long term business is restricted to reinsurance. This does not apply to undertakings which had been granted authorisation as composites prior to the implementation of the IBA in 1998. An undertaking authorised to carry out both long term and general business must manage each area of business separately.

Classes of Long Term Business

Class	Description
I	Life and annuity
II	Marriage and birth
III	Linked long term
IV	Permanent health
V	Tontines
VI	Capital redemption
VII	Pension fund management
VIII	Collective insurance
IX	Social insurance

Classes of General Business

Class	Description
1	Accident
2	Sickness
3	Land vehicles
4	Railway rolling stock
5	Aircraft
6	Ships
7	Goods in transit
8	Fire and natural forces
9	Other damage to property
10	Motor vehicle liability
11	Aircraft liability

12	Liability for ships
13	General liability
14	Credit
15	Suretyship
16	Miscellanous financial loss
17	Legal expenses
18	Assitance

Applications for authorisation are considered on a case-by-case basis by the MFSA. The authorisation granted may be restricted to business of reinsurance or be issued subject to any condition which the MFSA may deem necessary to impose. Chapter 1 of the Insurance Rules sets out the application procedure to be followed by applicants for authorisation and related forms. Chapter 5 of the said Insurance Rules also establishes rules relating to the two levels of solvency capital requirements of an undertaking, being the Minimum Capital Requirement (the "MCR") and the Solvency Capital Requirement (the "SCR").

14.8.3 Captive Insurance

Captive insurance is regulated by the MFSA in terms of the IBA and the Insurance Business (Captive Insurance Undertakings and Captive Reinsurance Undertakings) Regulations (Subsidiary Legislation 403.11 of the laws of Malta) issued under the IBA. Out of the 60 licensed insurance undertakings in 2016, eight were captive insurance undertakings.

The purpose of a captive is to provide insurance or reinsurance cover "*exclusively for the risks of the undertaking or undertakings to which it belongs or of an undertaking or undertakings of the group of which it is a member*".

14.8.4 Malta's Insurance Sector

Malta is an appealing jurisdiction to establish an insurance undertaking for a number of reasons. Below is a concise list of some of the principal reasons:

- Malta's EU membership and the corollary right of Maltese insurance undertakings (including captive insurance undertakings) to passport their license throughout the EU and the EEA States. This allows a Maltese insurer to carry on insurance business in most of Europe following a simple notification procedure to the MFSA;
- Malta's continuation of companies regulations allow insurance undertakings operating in other jurisdictions the opportunity to transfer their seat to Malta;
- Malta's extensive double taxation treaty network (see Appendix D);
- Malta's Protected Cell Company ("PCC") legislation;
- the RSPV Regulations;
- the SCC Regulations;
- Malta's sound company law (modelled on English company law rules and compliant with EU norms) and its fiscal legislation which operates an imputation taxation system;
- The insurance regulator's positive approach to regulation of the insurance industry;
- A comparatively low cost jurisdiction in the EU.

14.8.5 Continuation of Insurance Undertakings

In terms of the Insurance Business (Continuance of Companies Carrying on Business of Insurance) Regulations (Subsidiary Legislation 403.12 of the laws of Malta) a body corporate licensed in another jurisdiction may be authorised or enrolled by the MFSA to be registered as continuing in Malta.

Other than the requirement of MFSA's authorisation, the procedures for continuation of these body corporate are similar to those applicable to the continuation of companies generally.

Continuance or re-domiciliation of companies ensures the continuation of the corporate existence of the body corporate or similar entity in its new domicile.

14.8.6 Insurance Intermediaries

Insurance Brokers, Managers, Agents and Tied Insurance Intermediaries are regulated by the IIA. The IDA will introduce a new regime of intermediaries, the "*Ancillary Insurance Intermediaries*". Persons intending to carry on insurance intermediaries' activities in or from Malta must obtain the relative prior authorisation from the MFSA or seek enrolment or registration in the relative list or register. Authorised, enrolled or registered intermediaries are also subjected to on-going supervision by the MFSA.

14.8.7 European Single Passport – Insurers and Insurance Intermediaries

Since Malta's EU accession, insurance undertakings and intermediaries established in Malta are able to provide their services and establish a branch in any of the other EEA member States through the European "*Single Passport*". Similarly, insurers and intermediaries whose head office is situated in the EEA are able to "*passport*" their services or establish a branch in Malta.

This European "*Single Passport*" grants insurers and insurance intermediaries established and authorised in one EEA member State the right to offer their services and/ or to establish a branch in another EEA member state on the strength of their authorisation in the home member State. The procedure for availing of this European Single Passport under the services regime consists of a notification called the "*Notice of Intention*" to the home regulator of the insurer/ intermediary. The home regulator would then notify the host regulator.

The "*Notice of Intention*" would include:

(i) The classes of business and products to be offered in other EU/ EEA Member States;

(ii) The EU/ EEA member States where the company wishes to passport its services;

(iii) If applicable, the name and address of any establishment in the EU/ EEA member States where the company intends to passport, that is, from where it plans to provide services;

(iv) Estimate of premiums (gross and net of reinsurance) in respect of the activity to be carried out in each EU/EEA member State;

(v) A description of the proposed sources of business of insurance (e.g. insurance brokers, agents, direct selling and tied insurance intermediaries) and the approximate percentage expected from each source;

(vi) A confirmation that the company will continue to satisfy the SCR and the MCR with the new passporting activities;

(vii) A notification of any new or revised outsourcing arrangements as a result of this planned passporting activity; and

(viii) Details of any changes to the reinsurance arrangements where applicable.

The home regulator has up to one month from receipt of the above *Notice of Intention* to issue a *Consent N*otice to the EU/ EEA Regulatory Authorities concerned (the host jurisdiction) and the company will also be provided with this written notice of consent. Alternatively the MFSA must inform the company of its refusal and the reasons for such refusal. Upon receipt of this written notice of consent, the company may start its activities in the indicated EU/ EEA member States.

Insurers and intermediaries seeking to passport under the establishment regime, i.e. to establish a branch in another EEA member State, are required to submit an application to the MFSA which includes: a scheme of operations setting out the types of business envisaged; the structural organisation of the branch; contact details of the proposed branch; and the details of the branch's general representative. Certain classes of business also entail specific requirements.

Passported insurers/ intermediaries continue to be subject to regulation by the home member State but are required to satisfy any *General Good Provisions* notified by the host jurisdiction.

14.8.8 Protected Cell Companies

The Companies Act (Cell Companies Carrying on Business of Insurance) Regulations (Subsidiary Legislation 386.10 of the laws of Malta) allow a licensed re/insurance undertaking, captive insurance undertaking, insurance manager and insurance broker to be registered as or to convert to a PCC.

The law allows for:

- formation of multiple cells forming part of a single corporate person;
- creation and issue of cell shares;
- segregation and protection of cellular assets from other assets of the company;
- transfer of cellular assets to other persons, and extension of the protected cell assets concept to the transferee;
- use of non-cellular assets as a secondary asset base where cellular assets are exhausted.

A PCC is a single legal entity structured in two parts: the "*core*" or non-cellular part and the "*cells*". A PCC may have an unlimited number of cells, each writing re/insurance business. The core may or may not be authorised to write re/insurance business

and maintains and controls all the activities of the PCC. A protected cell transacts re/insurance business through the license held by the PCC.

The assets and liabilities of each cell are segregated from each other and there is also segregation between the cells and the core. However, despite this segregation, each cell has no separate legal identity. Therefore a cell cannot contract in its own right but through the PCC which acts on behalf of the cell. One Board of Directors is appointed by the PCC which has ultimate responsibility for all the activities of the core and the cells and for corporate governance requirements of the PCC as a whole. Committees may be appointed to oversee the business of a cell and may also delegate the management and administration of a cell or parts thereof to a third party insurance manager, subject to the control and supervision of the Board.

Assets of a PCC consist of cellular and/ or non-cellular assets. Cellular assets attributable to a cell only satisfy the liabilities of that particular cell. When the cellular assets of a cell are exhausted, there is recourse to the non-cellular (core) assets. However, cellular assets of other cells cannot be used to meet the liabilities of the cell whose assets have been exhausted. Non-recourse to any non-cellular (core) assets is permitted only where the cell carries on captive insurance business or business of reinsurance.

14.8.9 Incorporated Cell Companies

The Companies Act (Incorporated Cell Companies Carrying on Business of Insurance) Regulations (Subsidiary Legislation 386.13 of the laws of Malta) offer a body corporate the option to carry out business through an incorporated cell.

An incorporated cell has a juridical personality separate and distinct from that of the core company. Each incorporated cell is treated legally as though it were a separate limited liability company.

14.8.10 Capital and Solvency Requirements for Insurance Undertakings

Minimum capital requirements for local insurance undertakings are based on the Solvency II Directive. Authorised insurance undertakings and reinsurance undertakings have to hold eligible own funds covering the SCR and the MCR at all times.

Insurers are required to calculate the SCR using either a standard formula or an approved internal model. The MCR is subject to a prescribed minimum referred to as the "*absolute floor*", depending on the type of business being undertaken, as illustrated hereunder:

- 2,500,000 for direct general business, or 3,700,000 where liability classes, credit and suretyship are involved;
- 3,700,000 for long term business;
- 3,600,000 for reinsurance business, except for a captive reinsurance undertaking which has a requirement of 1,200,000.

The MCR is subject to a confidence level of 85% over a one year period while the SCR is subject to a confidence level of 99.5% over a one year period. The two levels of capital requirements serve as a ladder of intervention for the MFSA. Any undertaking that falls below the SCR will trigger this intervention with the regulator requesting a feasible recovery plan and re-establishment of the SCR within 6 months from observation of the breach. If the MCR is breached, the undertaking will have 3 months to restore its solvency position and the ultimate supervisory action will be to withdraw the licence of the undertaking if the solvency position is not restored.

Capital is categorised into three tiers under Solvency II, with Tier 1 having the highest quality, and being followed by other types of capital classified as Tier 2 or Tier 3. The SCR must be covered by at least 50% Tier 1 capital. The other half may be covered by Tier 2 and Tier 3 capital but Tier 3 is restricted to less than 15% of the SCR. The MCR has to be covered by at least 80% Tier 1 capital. Solvency II details the criteria for classification of the own fund items and unless the own fund item clearly falls within the list provided for each tier, the classification would be subject to regulatory approval.

Solvency II also allows for the use of Ancillary Own Funds as eligible own funds. These are committed but unpaid lines of capital but must be approved by the MFSA to be used to cover the solvency capital requirements. The second level of legislation of Solvency II, which is the Commission Delegated Regulation 2015/35 provides the detailed features that must be considered to classify the own funds.

14.8.11 Insurance and the Capital Markets

The Maltese jurisdiction builds on its sound securitisation legal and tax regime and its cell legislation to offer a wide variety of solutions including insurance sidecars and other alternative risk transfer solutions.

Maltese PCCs can, for example, be used to structure EU- domiciled sidecars which can write risk throughout the EU or enter into fronting arrangements at no risk of equivalence discounts being applied.

Malta's company law, cell legislation, and the operational benefits of the protected cell structures, can be the main drivers for demand in this area.

14.8.12 Insurance Securitisation

As further described in Sub-Section 14.7, the Securitisation Act (Chapter 484 of the laws of Malta) allows for the transfer of any risk between an originator and a securitisation vehicle by any means.

Local securitisation structures benefit from a favourable tax regime, and the Securitisation Transactions (Deductions) Rules (Subsidiary Legislation 123.128 of the laws of Malta) confirm that securitisation vehicles are tax neutral.

Securitisation vehicles can offer notes on a public or a private basis. In the former case, the notes can also be offered to investors domiciled across the EU with relative ease as a result of passporting possibilities.

The development of innovative insurance sidecar structures has enhanced the alternative risk transfer strategies of major companies worldwide and has provided a new gateway for capital markets investors to access the returns of the insurance markets.

Malta has also developed the RSPV structure which allows an undertaking other than an existing insurance undertaking or reinsurance undertaking, which assumes risks from a ceding undertaking, and which fully funds its exposure to such risks through the proceeds of a debt issuance or any other financing mechanism where the repayment right of the providers of such debt or financing mechanism is subordinated to the reinsurance obligations of such a vehicle. RSPV's are expressly recognised by the EU Reinsurance Directive and the Solvency II Directive.

14.9 Pensions

14.9.1 Overview of Maltese Pensions

In 1979 the Maltese Government created a mandatory minimum first pillar pension to those who qualify in accordance with the Social Security Act (Chapter 312 of the laws of Malta). Following various pension reforms along the years, the Special Funds (Regulation) Act (Chapter 450 of the laws of Malta, hereinafter referred to as the "SFA") was enacted in 2002 to create a framework aimed at supplementing the first pillar. This followed upon the Social Security Act of 1987, which had consolidated the previous laws, namely the Old Age Pension Act of 1948 and the National Assistance Act of 1956. Most recently, the Retirement Pensions Act (Chapter 514 of the laws of Malta, hereinafter referred to as the "RPA") was enacted (in 2011) in order to replace the SFA and is currently the law in force governing personal and occupational private pensions.

14.9.2 The Retirement Pensions Act & The Pension Rules

The RPA provides for inter alia the registration, application and regulation of retirement schemes and funds as well as for the licensing of Retirement Scheme Administrators ("RSAs") which are the operators responsible for administering the pension schemes. Typically the RSAs would also be trustees, financial institutions or insurers. Through the RPA, the MFSA is the appointed competent authority responsible for the regulation and enforcement of all matters falling within the remit of the RPA and any regulation issued thereunder.

The RPA, in fact, makes it illegal for any person to provide or hold himself out as providing a Retirement Scheme and/ or maintaining a Retirement Fund situated in Malta, unless such Scheme or Fund is licensed under the RPA. In addition, the RPA also prohibits any person (normally a licensed trustee) from accepting money or other consideration from a contributor to a Retirement Scheme situated in Malta, unless such scheme is a registered scheme complying with the requirements of the RPA.

The MFSA has supplemented the RPA through the introduction of the MFSA Pension Rules which include detailed regulations on the provision of services relating to Private and Occupational Pension Schemes and Retirement Funds as well as the necessary conditions for obtaining authorisation for their establishment and operation in or from Malta.

14.9.3 Occupational And Personal Retirement Schemes

In Malta a retirement scheme may be established as a *Personal Retirement Scheme* or as an *Occupational Retirement Scheme*.

A Personal Scheme is constituted for the purposes of received contributions primarily from private individuals with a view of providing retirement benefits to herself including also any additional nominated beneficiaries in certain circumstances.

An Occupational Scheme is established by a sponsoring undertaking (i.e. an employer) in respect of individuals working within the said

sponsoring undertaking which is tied to certain criteria including the person's dedicated years of service, seniority and any such other criteria for determining eligibility.

Both Personal and Occupational Schemes are subject to the MFSA Pension Rules for Personal Retirement Schemes and Occupational Retirement Schemes respectively.

14.9.4 Types And Legal Forms Of Retirement Schemes

Personal and Occupational Schemes may in turn be sub-categorised as *Defined Contribution*, *Defined Benefit*, and *Hybrid Schemes*.

A *Defined Contribution Scheme* is established with a view of collecting an agreed sum of contributions to the pension pot on a regular basis. A *Defined Benefit Scheme* is established with a view of providing a guaranteed sum of money as a retirement benefit to be paid upon retirement or such other trigger factor. A *Hybrid Scheme* includes elements of both. Specific additional requirements subsist under the MFSA Rules in respect of Defined Benefit Schemes over and above those established for Defined Contribution Schemes.

A Retirement Scheme may be established in the following forms under Maltese law:

(i) as an investment company with variable share capital ("SICAV") under the Companies Act;

(ii) as a trust by trust deed under the Trusts and Trustees Act, which is the most commonly used vehicle;

(iii) by contract in terms of the Civil Code (Chapter 16 of the laws of Malta); or

(iv) in any other legal form as may be approved by the MFSA.

14.9.5 Licensing Of Retirement Schemes

Unlike some other jurisdictions, Malta has chosen to regulate and licence pension schemes separately from their administrators in order to further protect the interests of consumers. An application for registration of a scheme must be filed with the MFSA and must be accompanied by a copy of the scheme document, the applicable fees, and any other information or particulars the MFSA may require, including a business plan with a 3-year financial forecast. A scheme administrator and, if necessary, an investment manager or custodian will also need to be registered with the MFSA or passported into Malta prior to providing services to a scheme established in Malta or to a RSA. An auditor will also need to be appointed in accordance with MFSA requirements since both the pension schemes and the RSAs are audited, as well as an actuary in case of a Defined Benefit Scheme.

Scheme applications and other documents are initially submitted to the MFSA in draft and subsequently reviewed by the MFSA. It typically takes around 3 months for a scheme licence application to be processed.

A one-time non-refundable application fee of 1,500 will also be levied upon initial submission to the MFSA, followed by a supervisory fee of 2,500 upon licensing and every year thereafter.

14.9.6 International Pension Plans

Maltese law fully transposes the Institutions for Occupational Retirement Provision Directive (the "IORP Directive") by means of the Retirement Pensions (European Passport Rights for Institutions for Occupational Retirement Provision) Regulations (Subsidiary Legislation 514.05 of the laws of Malta) which implement the international elements of the IORP Directive. These regulations cater for situations where passporting to or from Malta is required as a result of the fact that a Maltese registered scheme receives contributions from a sponsoring undertaking/ employer that is not established in Malta and/ or provides benefits for employees who are not resident in Malta.

A number of Maltese schemes have in fact been set up under the provisions of the IORP Directive in order to benefit from Malta's low cost base, its approachable regulator, and the Maltese double tax treaty network.

In the case of Personal Schemes, there is no supra-national legislation which regularizes the passporting and consequent promotion of such schemes in foreign jurisdictions. Therefore it rests upon the respective laws and regulators of the country in which the Scheme is marketed to regulate the promotion of the Scheme by the RSA or any other third party. From a Maltese law perspective, in order for a personal scheme to be marketed in another jurisdiction or to receive contributions and deliver benefits to a non-Maltese resident it must fundamentally be in compliance with certain basic requirements of the RPA.

14.9.7 QROPS

In December 2009 the MFSA confirmed that the HM Revenue & Customs (the "HMRC") in the UK will consider, on a case by case basis, pension schemes established in Malta as being eligible as Recognised Overseas Pension Schemes ("ROPS") in terms of

UK law. Since then around 30 Malta pension schemes have been registered with the HMRC as ROPS. Malta has also registered interest in the structuring of other foreign retirement schemes such as Qualifying Non-UK Pension Schemes ("QNUPS").

14.9.8 Taxation

The Income Tax Act (Chapter 123 of the laws of Malta, hereinafter at times referred to as the "ITA") brings to charge inter alia "any pension, charge, annuity or annual payments". However, distributions by Retirement Schemes to non-Maltese residents may be exempt from Maltese tax and are paid without Maltese withholding taxes by the application of double taxation treaties and/ or general principles of international law. Distributions to Maltese tax residents will be taxed at the progressive tax rates of up to 35%, subject to changes made to the tax rates within the annual Malta Government Budget, bar a 30% lump sum payment which may be exempt from taxation in accordance with the Pension Rules and/or the provisions of the ITA. All income of licensed pension schemes in Malta is also exempt from Maltese tax in accordance with the provisions of the ITA.

Moreover, by means the Voluntary Occupational Pension Scheme Rules (Subsidiary Legislation 123.175 of the laws of Malta), the Government launched various tax incentives for Malta-based pension plans where an employer is also a contributor to the pension plan. These rules apply as from 2017 and have established that once an employer or an employee decides to contribute in a so-called "qualifying scheme", some tax credits or deductions become available. These measures have given new life to the local pensions industry insofar as employers in Malta are now incentivised to consider the number of options that are available to them in order to potentially create pension schemes for their employees.

14.10 Gaming and Betting

Gaming is regulated under the Lotteries and Other Games Act (Chapter 438 of the laws of Malta) which regulates gaming activities in Malta.

14.10.1 Remote Gaming

Remote gaming is the largest gaming industry in Malta and the issue of remote gaming licenses is regulated primarily through the Remote Gaming Regulations (Subsidiary Legislation 438.04 of the laws of Malta).

"*Remote gaming*" includes any form of gaming by means of distance communications.

Different licences apply depending on the type of activity the prospective licensee wishes to undertake. These licences are:

(i) *Class 1 Remote Gaming Licence*, which is a remote gaming licence for casino-type games and online lotteries, whereby operators manage their own risk on repetitive games;

(ii) *Class 2 Remote Gaming Licence*, which is a remote betting office licence an example of which would include fixed-odds betting, whereby operators manage their own risk on events based on a matchbook;

(iii) *Class 3 Remote Gaming Licence*, which is a licence to promote and/ or abet remote gaming from Malta, examples of which would include poker networks, peer-to-peer ("P2P") gaming and game portals; and

(iv) *Class 4 Remote Gaming Licence*, which is a licence to host and manage remote gaming operators, excluding the licensee concerned himself, whereby software vendors providing management and hosting facilities on their platform. In essence, a Class 4 Licence may be understood as constituting a business to business gaming licence.

These classes of licences will be phased out in the near future when a new set of Remote Gaming Regulations will come into force. Under the new regulations the classes of licences will be limited to two – business to business, and business to consumer, with different obligations applying to the two.

In order to apply for a remote gaming licence, the applicant must be a limited liability company established in Malta in compliance with the requirements of the Companies Act.

In effect, the application process may be described as a three-pronged approach; encompassing the need for the licensee to undergo and successfully complete three different application stages, including the submission of all required documentation and forms, prior to approval of the application by the Malta Gaming Authority ("MGA").

These three stages are as follows:

(i) Stage 1: Fit and Proper Test;

(ii) Stage 2: Business Plan;

(iii) Stage 3: Operational and Statutory Requirements.

In respect to the above mentioned stages, the MGA allows for the relevant forms and required documentation relating to the above outlined stages to be submitted in one batch (rather than in a piecemeal fashion), together with the application in question. In view of this, the forms that would need to be compiled and submitted during the application process, include the following:

(i) Remote Gaming Licence Application;

(ii) Business Entity Declaration Form;

(iii) System Documentation Review; and

(iv) Personal Declaration.

The applicant is also required to appoint and designate a "*Key Official*" when submitting an application to the MGA. This person would be considered as the responsible person towards the MGA and must be resident in Malta and must also be a director of the applicant company.

Fees And Taxation

On applying for the issuance of a Remote Gaming Licence, an official fee of 2,330 is to be payable to the MGA. This fee applies to all applications for a Remote Gaming Licence, irrespective of the particular Class of licence covered by the application in question.

Following this, the licence-holder will be required to pay, amongst others, a monthly gaming tax as well as a yearly licence fee of 8,500, yearly in advance.

The following rates of taxation are applicable according to the four different classes of licences established above:

- Class 1 Licensee: 4,600 per month for the first six months and subsequently 7,000 per month for the entire duration of the licence period. When the Class 1 licensee is operating on a hosting platform in possession of a Class 4 Remote Gaming licence, it shall however pay 1,200 per month for the entire duration of the licence.
- Class 2 Licensee: a sum equivalent to 0.5% of the gross amounts of bets accepted in remote betting operations.
- Class 3 Licensee: a sum equivalent to 5% of real income.
- Class 4 Licensee: no tax is payable for the first six months after obtaining the licence. For the subsequent six months, a sum of 2,300 per month and thereafter for the entire duration of the licence, a sum of 4,600 per month is due.

In all cases, the maximum tax payable by one licensee in respect of any remote gaming licence, per annum, shall not exceed 466,000.

In addition, remote gaming licenses must be renewed every five years. A renewal fee of 1,500 is payable to the MGA.

In July 2017, the MGA issued a new consultation document entitled "*A White Paper to Future Proof Malta's Gaming Legal Framework*" which overhauls the current remote gaming legislation infrastructure and also proposes to amend the fees payable.

The proposed overhaul greatly simplifies the tax framework by introducing separate regulations which relate solely to taxation issues which would apply across the spectrum of gaming activities. The proposed regulations provide that taxation is to be based on gaming revenue generated by operators from end customers located in Malta.

In addition, the proposed regulations would abolish taxation payable as a fixed fee, in the interest of ensuring that the taxation model imposed on the gaming sector is equitable and fair. As a result, the proposed regulations streamline taxation of gaming activities into two main categories, namely a general *gaming tax*, and a *tax on gaming devices*.

In the case of the gaming tax, the proposed regulations provide that any person offering any gaming service to any player physically present in Malta at the time when the gaming service is actually provided, shall, in addition to the levy on gaming devices, if any, pay to the MGA, for each tax period (as defined in the proposed regulations) a gaming tax to be computed according to the rates established in the proposed regulations (currently proposed at 5% of the gaming revenue generated from the said gaming services during the relevant tax period (which in turn is defined as the financial year of the person carrying out a gaming activity)).

The proposed overhaul of the gaming regulatory infrastructure also includes a proposal for separate regulations for licence fees. The proposed Gaming Licence Fees Regulations provide for a two-tier licence fee for operators of gaming services in possession of the full 10-year licence. Licence fees payable per activity will be abolished, in favour of a singular fee made up of fixed and variable parts.

In terms of the proposed regulations, a fixed licence fee of 25,000 will be due every 12 months, in advance. The variable licence fees payable will differ according to the type of gaming services provided as well as the amount of revenue generated during the licence period.

The proposed variable licence fees are as follows:

Type 1 gaming services (including casino type games, lotteries and virtual sports games)

Variable Licence Fee for the Licence Period	Applicable Rate
Where Gaming Revenue does not exceed 1,000,000	12,000
Where Gaming Revenue does not exceed 5,000,000	54,000
Where Gaming Revenue does not exceed 10,000,000	120,000
Where Gaming Revenue does not exceed 20,000,000	210,000
Where Gaming Revenue does not exceed 45,000,000	330,000
Where Gaming Revenue does not exceed 75,000,000	480,000
Where Gaming Revenue exceeds 75,000,000	660,000

Type 2 gaming services (including games of chance played against the house, the outcome of which is determined by a result of an event or competition and the operator manages risk by managing odds offered to the player)

Cumulative Gaming Revenue for the tax period	Applicable Rate
For every euro of the first 3,000,000	4%
For every euro of the next 4,500,000	3%
For every euro of the next 5,000,000	2%
For every euro of the next 7,500,000	1%
For every euro of the next 10,00,000	0.8%
For every euro of the next 10,000,000	0.6%
For every euro of the remainder	0.4%

Type 3 gaming services (including games of chance wherein the operator generates revenue by taking a commission on the stakes or the prize and includes player versus player games such as poker and bingo)

Cumulative Gaming Revenue for the tax period	Applicable Rate
For every euro of the first 2,000,000	4%
For every euro of the next 3,000,000	3%
For every euro of the next 5,000,000	2%
For every euro of the next 5,000,000	1%
For every euro of the next 5,000,000	0.8%
For every euro of the next 10,000,000	0.6%
For every euro of the remainder	0.4%

Type 4 gaming services (including controlled skill games)

Cumulative Gaming Revenue for the tax period	Applicable Rate
For every euro of the first 2,000,000	0.5%
For every euro of the next 3,000,000	0.75%
For every euro of the next 5,000,000	1%
For every euro of the next	1.25%

5,000,000	
For every euro of the next 5,000,000	1.5%
For every euro of the next 10,000,000	1.75%
For every euro of the remainder	2%

14.10.2 Amusement Machines

An amusement machine is any type of machine used for the purpose of playing games, exclusively for amusement purposes and not for gambling purposes and which is operated by the insertion of money or tokens and where in the operation thereof a successful player neither receives nor is offered any benefit other than the opportunity, if any, afforded by the automatic action of the machine to play the game again without the insertion of other money or amusement machine token. Such machines include billiards, pool and snooker or table-soccer tables unless operated electronically as well as "*kiddie rides*" including track rides, carousels and hydraulic rides.

Amusement machines need to be approved and registered in terms of the Amusement Machine Regulations (Subsidiary Legislation 438.06 of the laws of Malta). Operators require different licences depending on the type of activity the prospective licensee wishes to undertake. A Class 1 license is required (to manufacture, assemble, sell, supply or operate an amusement machine, in Malta). A Class 2 licence is required to host amusement machines on a premises accessible to the public.

14.10.3 Casinos

There is no specific definition of a "*casino*" and the Gaming Act (Chapter 400 of the laws of Malta) simply provides that the term *casino* refers to any premises in relation to which the Minister responsible for Finance has granted a concession.

In order to be granted such a concession, operators must pay such consideration deemed fit by the responsible Minister, though operators also require a license from the MGA. Such a licence may only be issued to companies registered in Malta which have the financial means and expertise to be able to operate a casino and whose directors and shareholders are persons of integrity.

14.10.4 Gaming Devices

The term "*gaming device*" refers to any electrical, electronic or mechanical device, ticket or any other thing which is used or intended for use in connection with the operation, promotion, or sale of a game and/ or in gaming.

Different licences apply depending on the type of activity the prospective licensee wishes to undertake in accordance with the Gaming Devices Regulations (Subsidiary Legislation 438.07 of the laws of Malta). The manufacture, assembly, repair, servicing, distribution or making available for use of a "*gaming device*" requires a licence Class 1 Licence. The distribution, sale or transfer of a gaming device requires a Class 2 Licence. A Class 3 Licence is required to host gaming devices while a Class 4 licence is required to operate the central system for such devices. There are, however, certain exemptions which do not entail the requirement of a licence (e.g. a coin-operated claw crane vending machine).

14.10.5 Skill Games

"*Pure skill*" games do not require a license and are only subject to general legislation such as consumer protection and data protection legislation.

The recently enacted Skill Games Regulations (Subsidiary Legislation 438.11 of the laws of Malta) provides that the MGA is empowered to give a ruling as to whether a game is a "*pure skill game*" or a "*controlled skilled game*", in which case such a game would require a licence. The MGA makes such a ruling based upon a set of considerations laid down in the First Schedule of the aforementioned Skill Games Regulations.

A licence may be issued to any commercial entity established in the EU or the EEA, and consequently it is not necessary to register a company in Malta. A key official must also be appointed for a licence to be issued.

An application fee of 2,300 is payable upon lodging an application and a licence fee of 8,500 is payable per annum. Taxation is payable at a rate of 5% of real income. In any case the maximum tax payable annually by a single controlled skill game operator shall not exceed 466,000.

14.11 Compliance

14.11.1 Professional Secrecy and Confidentiality

The obligation of confidentiality has been embedded in Maltese law for many years, having been enshrined in Article 257 of the Criminal Code (Chapter 9 of the laws of Malta). This article establishes that it is a criminal offence for a person, who by reason of his calling, profession or office, becomes the depositary of any secret confided in him, to disclose such secret, except when compelled by law to give information to a public authority. This offence is punishable with a fine (*multa*) not exceeding 46,587.47 or to imprisonment for a term not exceeding 2 years, or to both such fine and imprisonment. However, the original "*sanctity*" of the obligation of confidentiality has been eroded legislatively and exceptions have been introduced over time in line with international developments.

The Professional Secrecy Act (Chapter 377 of the laws of Malta, hereinafter referred to as the "PSA") also regulates the parameters and scope of confidentiality obligations in the case of several professions and service providers. The PSA is the main point of reference in relation to the duty of professional secrecy, its aim being not only to clarify the notion of professional secrecy but also to set minimum standards. The PSA has been seen as a form of interpretative guide to Article 257 of the Criminal Code (which is the main provision of Maltese law penalising breaches of the obligation of professional secrecy). Thus, the PSA essentially cross-refers to Article 257 of the Criminal Code and clarifies what its various provisions mean and then proceeds to lay down the various exceptions to the duty of professional secrecy.

In the PSA, a "*professional secret*" or "*secret*" refers to information which falls under any of the following categories:

(i) is to be considered secret under a specific provision of law (e.g. the Banking Act); or

(ii) is described as secret by the person communicating it to a person who, by reason of his calling, profession, or office, becomes the depositary of a secret confided in him; or

(iii) has reasonably to be considered as secret because of the circumstances in which the information has been communicated and received, the nature of the information and the calling, profession or office of the person receiving the information and of the person giving it, where applicable.

The persons who are treated as having a "*calling, profession or office*" are not exhaustively listed in the PSA but include *inter alia* advocates, notaries, legal procurators, accountants, auditors, trustees, employees and officers of financial and credit institutions, persons licensed to provide investment services under the Investment Services Act, stockbrokers licensed under the Financial Markets Act, insurers, insurance agents, insurance managers, insurance brokers, insurance sub-agents, and officials and employees of the State. A person also remains bound by the duty of professional secrecy even after he ceases to exercise the relevant profession or calling or after having ceased to occupy the relevant office.

The PSA states that a person is also deemed to have become the depository of a secret by reason of his calling, profession or office when he obtains such secret by reason of being an employee, or employer, partner or assistant of a person named above, or by reason of having acted as an interpreter or translator in the communication of such secret. A person is also deemed to have become the depository of a secret by virtue of his calling, profession or office where he obtains such secret during the course of his employment by the State.

The PSA establishes that a person employed by the State who communicates secret information to another person employed by the same entity or to the Minister responsible for that entity, where such communication is directly necessary for the carrying out of their respective functions, is not deemed to have disclosed a professional secret. To avoid problems of disclosure involving (a) any body corporate established by law, and (b) the Department of Inland Revenue, the PSA deems these particular entities as separate and distinct from the other departments or divisions of the State. Accordingly, the Department of Inland Revenue and bodies corporate established by law cannot divulge to or be recipients of secret information from other departments or divisions of the State.

Besides the duty of professional secrecy (which is no doubt the principal axis of the concept), the obligation of confidentiality under Maltese law may also be looked at from various perspectives. For instance, the Official Secrets Act (Chapter 50 of the laws of Malta), caters for another aspect of confidentiality and generally prohibits the disclosure without lawful authority or official authorisation of any information, documents, material or articles which would be prejudicial or

damaging to the security, safety or interests of Malta.

Confidentiality concerning depositions of evidence before the Courts of Malta is also another important aspect of the obligation of confidentiality. The Code of Organisation and Civil Procedure (Chapter 12 of the laws of Malta, hereinafter referred to as the "COCP") upholds the principle that no advocate or legal procurator may, without the consent of the client, and no clergyman without the consent of the person making the confession, be questioned on such circumstances as may have been stated by the client to the advocate or legal procurator in professional confidence in reference to the cause, or as may have come to the knowledge of the clergyman under the seal of confession. A similar privilege extends to accountants, medical practitioners, social workers, psychologists and marriage counsellors, although in their case a Court may order disclosure.

Unfortunately, the various legislative provisions that regulate the obligation of confidentiality (with the exception of the protection of personal data) are not gathered or organised in an orderly fashion in one legislative instrument and, despite the PSA s enactment, various provisions relating to the duty of professional secrecy are to be found scattered in various laws such as:

- Article 588 of the COCP;
- Article 40 of the Income Tax Act;
- Article 17 of the Income Tax Management Act (Chapter 372 of the laws of Malta);
- Article 26 of the Investment Services Act;
- Article 34 of the Banking Act;
- Article 38 of the Financial Markets Act;
- Article 59 of the Insurance Business Act;
- Article 25 of the Financial Institutions Act; and
- Articles 133 and 257 of the Criminal Code.

There are a number of exceptions to the duties of professional secrecy and confidentiality, and these include:

(i) Consent: the typical case is where the person entrusting the information consents in person to the disclosure.

(ii) Permitted Disclosures: no offence against professional secrecy is committed when a person discloses in good faith secret information (i) for the purpose of obtaining advice or directions from the body regulating his profession; (ii) to a public authority, court or tribunal to the extent that is proportionate and reasonably required for the specific purpose of defending himself against any claim with regard to professional work in connection with which the secret information has been obtained by him or for the purpose of initiating and maintaining judicial proceedings seeking the recovery of fees or other sums due to him or the enforcement of other lawful claims or interests; or (iii) to a competent public authority in Malta in the reasonable belief that such disclosure is reasonably necessary for the purpose of preventing, revealing, detecting or prosecuting the commission of acts that amount or are likely to amount to a criminal offence or to prevent a miscarriage of justice.

(iii) Unless otherwise stated, communications to employees, partners and assistants of the person to whom the information was entrusted or to other persons who are equally bound by professional secrecy, where such communication is necessary for the performance of services requested by the person who entrusted the information, do not constitute a breach of law.

(iv) Obligatory Disclosures: except for *legal privilege* as set out in the COCP, a person must disclose information otherwise covered by professional secrecy or confidentiality obligations when required to do so by:

a. a competent law enforcement or regulatory authority investigating a criminal offence or a breach of duty or by the Security Service established by the Security Service Act (Chapter 391 of the laws of Malta);

b. a magistrate in the cause and for the purposes of *in genere* proceedings;

c. a court of criminal jurisdiction in the course of a prosecution for a criminal offence; or

d. a specific statutory requirement having the effect of compelling a person to divulge information to a public authority. It is also a defence to show that the disclosure was made to a competent public

authority in or outside Malta investigating any act or omission committed in Malta and which constitutes, or if committed outside Malta would in corresponding circumstances constitute an offence under the relevant drug laws and/ or under the relevant anti-money laundering laws (though this defence does not apply to members of the legal profession or the medical profession).

(v) Court Orders: a court may authorise or make an order requiring the disclosure of secret information if there is an express provision of law granting it such power. In that case, the Court's power to do so is limited to the specific purpose for which that provision was enacted or for the specific purpose of preventing, disclosing or detecting the commission of acts that amount or are likely to amount to a criminal offence (in which case, disclosure of such evidence is to be held *in camera* and is accessible only to the court and to the parties).

(vi) Public Domain: if at the time the information was revealed, the information had legitimately entered the public domain.

In the exercise of its functions and powers under the MFSA Act, the MFSA has the right to reasonable access and entry to any business premises and offices of a licence holder, access to any relevant documentation and/ or records of a licence holder, including access to any telephonic or other records and access to any other information relating or pertaining to the activities licensed or authorised by the MFSA or otherwise falling under its supervisory or regulatory functions.

The directors and managers or other persons in charge of the operations or activities falling under the supervisory or regulatory functions of the MFSA must assist and collaborate with the MFSA in order to enable it to discharge its functions, and must collate and transmit without any undue delay such information and documentation as the MFSA may reasonably request from time to time. The activities licensed or authorised by the MFSA would refer to licensees authorised in terms of the MFSA Act, the Banking Act, the Investment Services Act, the Insurance Business Act, the Financial Institutions Act, and the Financial Markets Act. These laws also often create statutory exceptions to the duty of confidentiality.

Similar powers also exist in relation to the Registrar of Companies who, under the Companies Act, also has wide regulatory and investigative powers in relation to Maltese companies in a context where the limitations of confidentiality are to a certain extent waived by law.

Laws regulating regulated entities typically also impose an obligation on auditors to communicate to the MFSA, any information or opinion on a matter which the auditor has become aware (in his capacity as auditor of the licensed entity) and which is relevant to any functions of the competent authority or which is specifically required to be disclosed. Such disclosure will not be deemed to constitute a breach of the auditor's duty of professional secrecy. These provisions are aimed at assisting the competent authority and facilitating its role of monitoring and regulating its licensees, and at ensuring that licensees maintain vigilance at all times. They also reflect the changing times and the international developments taking place in connection with the international efforts against drug trafficking, money laundering and terrorism in particular.

Disclosure Pursuant to Anti-Money Laundering and Funding of Terrorism Laws

Perhaps the most dramatic in-road into the confidentiality obligation binding the legal profession was effected by the introduction of the Prevention of Money Laundering and Funding of Terrorism Regulations (Subsidiary Legislation 373.01 of the laws of Malta, hereinafter referred to as the "PMLFTR") giving effect to the EU Directives, and which imposes on lawyers and certain other professions the obligation of disclosing information, supported by the relevant identification documentation, to the Financial Intelligence Analysis Unit (the "FIAU") when they obtain any information and are of the opinion that the information indicates that any person has or may have been engaged in money laundering or in the funding of terrorism. This effectively limited what was, prior to the introduction of the said PMLFTR, the absolute obligation of confidentiality that lawyers had hitherto been under.

A "subject person" of the PMLFTR (even if a member of the legal profession) must examine with special attention, and to the extent possible, the background and purpose of any complex or large transaction, including unusual patterns of transactions, which have no apparent or economic or visible lawful purpose. One must also examine other transactions which are particularly likely, by their nature, to be related to money laundering or the funding of terrorism. Besides having a preventative dimension to it, the purpose behind these examinations is for the subject person to

ultimately make findings available to the FIAU and to the relevant supervisory authority in accordance with applicable law where the obligations to report arises.

Where a subject person knows, suspects, or has reasonable grounds to suspect that:

(i) funds are the proceeds of criminal activity,

(ii) a transaction may be related to money laundering or the funding of terrorism, or

(iii) that a person may have been, is or may be connected with money laundering or the funding of terrorism, or

(iv) that money laundering or the funding of terrorism has been, is being or may be committed or attempted

that subject person is obliged, as soon as is reasonably practicable, but not later than 5 working days from when the knowledge or suspicion first arose, to disclose that information, supported by the relevant identification and other documentation, to the FIAU.

The FIAU may also demand information from subject persons, and in such event the said subject person must comply with such request as soon as is reasonably practicable, but not later than 5 working days from when the demand is first made.

The provisions of the Prevention of Money Laundering Act (Chapter 373 of the laws of Malta, hereinafter referred to as the "PMLA") have also continued eating into the obligations of professional secrecy by giving the FIAU the power to demand from any person, authority or entity, any information it deems relevant and useful for the purpose of pursuing its functions.

When the FIAU receives a suspicious transaction report, or when information in its possession results in the FIAU suspecting that any subject person may have been used for any transaction suspected to involve money laundering, funding of terrorism or property that may have derived directly or indirectly from, or constitutes the proceeds of, criminal activity, the FIAU may demand from the subject person making the report or from any subject person which is suspected of having been used for any transaction suspected to involve money laundering, funding of terrorism or property that may have derived directly or indirectly from, or constitutes the proceeds of, criminal activity, as well as from any other subject person, the police, any Government Ministry, department, agency or other public authority, or any other person, physical or legal, and from any supervisory authority, any additional information that it deems useful for the purpose of integrating and analysing the report or information in its possession.

The subject person or any other person, physical or legal, and any other authority or entity from whom this information is demanded by the FIAU must communicate the information requested to the FIAU, and such disclosure is deemed by law to be a permitted disclosure of information to a public authority compelled by law for the purpose of Article 257 of the Criminal Code.

Lawyers and other professionals are exempt from the reporting obligation if they receive or obtain information in the course of ascertaining the legal position of their client or in performing their responsibility of defending or representing that client in, or concerning judicial proceedings. This includes advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

Disclosure Pursuant to Taxation Laws

Another dramatic in-road to the obligations of professional secrecy has also been made in the tax sphere since the Income Tax Management Act provides that if the Commissioner for Revenue has reasonable grounds to suspect that tax has been, is, or may be evaded by any person, he may request, by notice in writing to a designated person, that the designated person provide the Commissioner for Revenue, within the time indicated in such notice (not being less than 30 days from the date of service of such notice), with all such information and documentation which the designated person may have relating to property transferred or delivered to him by that person, and owned, possessed, or held by the designated person under any title on behalf of or for the benefit of any such person (and which may refer to a period of 5 years preceding the said notice). The designated person will however not be bound to provide information to the Commissioner for Revenue in respect of any beneficiaries for whose benefit the property may be held or the terms and conditions under which it is so held. The Income Tax Management Act specifically states that the disclosure obligations referred to here are to be adhered to notwithstanding the professional secrecy obligations.

14.11.2 Prevention of Money Laundering and Combating The Funding of Terrorism

The prevention of money laundering and combating the funding of terrorism in Malta is principally regulated by the Prevention of Money Laundering Act (Chapter 373 of the laws of Malta,

hereinafter referred to as the "PMLA"), the Prevention of Money Laundering and Funding of Terrorism Regulations (Subsidiary Legislation 373.01 of the laws of Malta, hereinafter referred to as the "PMLFTR") issued in terms of the PMLA, and the Criminal Code.

The PMLFTR reflect broadly the EU Directives on the prevention of money laundering and the funding of terrorism. Currently, the provisions of the EU Third Money Laundering Directive are incorporated in the PMLFTR. However at the time of writing, the Maltese Parliament is in the process of transposing the provisions of the EU Fourth Money Laundering Directive, principally by restating the PMLFTR. Part of the EU Fourth Money Laundering Directive has already been transposed by the Maltese Parliament by means of Act XXVIII of 2017, amending the PMLA. This excludes the controversial central register of beneficiaries proposal that is expected to be transposed any time now. Maltese law also reflects the Financial Action Task Force (the "FATF") Forty Recommendations (incorporating the Nine Special Recommendations). Malta's compliance with the FATF Forty Recommendations was confirmed in a progress report and written analysis by the Secretariat of Core Recommendations adopted at the Select Committee of Experts on the Evaluation of Anti-Money Laundering Measures (MONEYVAL) 34th Plenary Meeting in 2010, and confirmed again in the 4th Mutual Evaluation Report on Malta on the 6th March 2012.

Malta has acceded to the United Nations Convention (1988) against illicit Traffic in narcotic Drugs and Psychotropic Substances (Vienna Convention) on the 28th February 1996 (in force in Malta as of the 28th May 1996), and has signed the United Nations Transnational Organised Crime Convention (Palermo Convention) on the 14th December 2000 (ratifying it on the 24th September, 2003). Malta's money laundering offences, in fact, are broad and fully cover the elements of the Vienna and Palermo Conventions.

Malta has also acceded to the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ETS No.141) on the 19th November 1999 (in force in Malta as of the 1st March 2000).

Malta has also, on the 11th November 2001, ratified the UN International Convention for the Suppression of the Financing of Terrorism (the Terrorist Financing Convention, adopted by the General Assembly of the United Nations in resolution 54/109 of 9 December 1999) as well as the the Council of Europe Convention on Laundering Search, Seizure and Confiscation of the proceeds from Crime and on the Financing of Terrorism on the 30th January 2008 (in force in Malta on the 1st May 2008).

The United Nations Security Resolutions are implemented in Malta through subsidiary legislation enacted in terms of the National Interest (Enabling Powers) Act (Chapter 365 of the laws of Malta).

In the field of international cooperation Malta is able to extend mutual assistance on the basis of reciprocity, as provided for in Article 649 of the Criminal Code. Malta has concluded a number of bilateral agreements with other States relating to co-operation in the fight against drugs and organised crime.

The standards set up by the Egmont Group are also applied by the FIAU, which has, in fact, been a member of the Egmont Group since July 2003. The information exchange with foreign financial intelligence units ("FIUs") is regulated as one of the functions of the FIAU and as an exemption from the prohibition of disclosure. In fact, the PMLA grants the authority to the FIAU, as one of its functions, to exchange information for AML/CFT purposes, either upon request or on its own motion with any foreign body, authority or agency which it considers to have equivalent or analogous functions to the FIAU.

Insofar as asset recovery is concerned, the National Fraud Squad (the Economic Crimes Unit of the Police) is designated as a national asset recovery office in Malta and communicates through the informal network of the Camden Asset Recovery Inter-agency Network (CARIN), of which it is a member.

Malta is also a member (indeed, a founding member) of MONEYVAL which was established in September 1997 by the Committee of Ministers of the Council of Europe in order to conduct self and mutual assessment exercises of the anti-money laundering measures in place in the 24 Council of Europe countries which are not members of the FATF. Malta chaired the Committee until December, 2003.

Malta has also joined the International Organisation of Securities Commissions ("IOSCO"). Although not a member of the FATF, it is deemed to have co-operation status with the FATF and was never regarded by the FATF as a non- cooperative country or territory. Malta also fully co-operates with the OECD. Malta is not a Member of the Financial Stability Board ("FSB") but the levels of its regulatory systems are deemed by the FSB as showing sufficiently strong adherence.

The FIAU is the Government agency which is responsible for, *inter alia*, the collection, collation,

processing, analysis and dissemination of information with a view to combating money laundering and the funding of terrorism, together with providing and promoting training of personnel, gathering information and co-operating and exchanging information with local and other competent supervisory authorities overseas. Another core function of the FIAU is to monitor and ensure compliance by subject persons (namely the financial and non-financial organizations and persons that are subject to the PMLFTR) with their obligations set out under the PMLFTR. In 2014, the FIAU signed a Memorandum of Understanding with the MFSA whereby it was agreed that the MFSA would take on the supervision of AML/CFT compliance by certain financial services licence holders, including trustees and CSPs, on behalf of the FIAU.

The PMLA grants the FIAU the power to demand from "*any person, authority or entity*" any information it deems relevant and useful for the purpose of pursuing its functions. Amendments introduced in 2005 generally extended the powers of the FIAU to cover also situations relating to the funding of terrorism (which became a criminal offence following amendments to the Criminal Code, and also extended the "predicate offences" in respect of which the offence of money laundering may be deemed committed to cover any "*criminal offence*", whenever or wherever it is carried out. The amendments introduced in 2007 implemented the provisions of the Council of Europe Convention No. 198 on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism, which was built on the success of the 1990 Council of Europe Convention on Laundering, Search, Seizure and Confiscation of the Proceeds of Crime (ETS No.141). Amendments in 2015 further extended the powers of the FIAU to also receive reports in relation to transactions or activities suspected to involve property that may have originated from, or constitute the proceeds of, criminal activity. The FIAU is also vested with the power to delay the execution of a suspicious transaction.

Amendments in 2015 also increased the penalties imposed for the contravention or non-compliance with the rules and regulations to 150,000 (or imprisonment for a term not exceeding 2 years or both) and, pertinently, the introduction of a "*name and shame policy*" whereby administrative penalties exceeding 1,500 imposed by the FIAU would be published. Following the amendments brought about by Act XXVIII of 2017 in order to partly transpose the EU Fourth Money Laundering Directive, it is penalties above 10,000 that have become final and due that are now subject to publication.

The same amending law also introduced a formal right of appeal against administrative penalties imposed by the FIAU that exceed 5,000 and also capped criminal punishments to which subject persons may be subject at 1,000,000 or imprisonment for a term not exceeding 5 years, and administrative penalties to 5,000,000 or twice the amount of the benefit derived from the contravention, breach or failure to comply (where this can be determined), or 10% of the total annual turnover of the subject person (according to the latest approved available financial statements).

The FIAU has published "*Implementing Procedures*" (the "IP") in order to provide guidance to subject persons on the implementation of their obligations under the PMLFTR. The IP are divided into two parts: Part I is applicable to all sectors and Part II applies to specific sectors. Part I of the IP was published on the 20th May 2011 and was recently amended on the 27th January 2017. Part II applicable to the Banking Sector was issued on the 18th November 2011 and was then amended on the 19th November 2013 whilst Part II applicable to Land-Based Casinos was issued on 25th September 2015.

The IP are binding and failure to comply with such procedures shall render subject persons liable to an administrative penalty of not less than 1,000 and not more than 46,500. The FIAU has removed the risk of "*double jeopardy*"; therefore if the same act gives rise to a breach of both the PMLFTR and the IP, only one penalty will be inflicted.

The Malta Institute of Financial Services Practitioners (the "IFSP") have also published Guidance Notes on Prevention of Money Laundering and Financing of Terrorism in order to provide guidance to its members who belong to various sections of the financial services industry and include lawyers, external accountants, tax advisors, fiduciaries and trustees. Various other professional associations have done likewise, or are in the process of enacting their own guidance.

The PMLA is of general application. In terms of the PMLA: (i) money laundering is considered to be a criminal offence entailing criminal prosecution together with the freezing of the property of the person accused, while (ii) the offence of money laundering is committed if the proceeds of any criminal offence, are converted, transferred, concealed, disguised, acquired, possessed or retained without reasonable excuse in the knowledge or suspicion that such proceeds are derived directly or indirectly from a criminal activity or from an act or acts of participation in criminal activity or constitute the proceeeds of crime.

The PMLA does not deal with money laundering compliance and procedures as these are dealt with in detail by the PMLFTR.

In terms of the PMLFTR, any person carrying out either a "*relevant activity*" or "*relevant financial business*" is obliged to follow:

(i) the customer due diligence, including identification and verification, procedures;

(ii) record-keeping procedures;

(iii) internal reporting procedures;

(iv) initial and on-going educational and training; and

(v) procedures on internal control, risk assessment, risk management, compliance management and communication.

The above mentioned obligations are laid down in detail in the PMLFTR which also require the subject persons to develop effective client acceptance policies and procedures that are conducive to determine, on a risk sensitive basis, whether an applicant for business is a politically exposed person ("PEP"). Both risk-assessment and risk-management procedures are mandatory as will be the risk based approach following the transposition of the EU Fourth Money Laundering Directive. The risk based approach ensures that subject persons may determine the extent of the application of customer due diligence requirements on a risk-sensitive basis, which depends on the type of customer, business relationship, product or transaction. There are also provisions in the PMLFTR concerning PEPs which require the application of enhanced customer due diligence in respect of the applicant for business.

Any one of the following activities is considered to be "*relevant financial business*" for the purposes of the PMLFTR:

(i) any business of banking carried on by a person or institution who is for the time being authorised, or required to be authorised, under the provisions of the Banking Act;

(ii) any activity of a financial institution carried on by a person or institution who is for the time being authorised, or required to be authorised, under the provisions of the Financial Institutions Act;

(iii) long term insurance business carried on by a person or institution who is for the time being authorised, or required to be authorised, under the provisions of the Insurance Business Act, or enrolled or required to be enrolled under the provisions of the Insurance Intermediaries Act, other than natural persons who are enrolled as intermediaries and act on behalf of another intermediary, any affiliated insurance business carried on by a person in accordance with the Insurance Business (Companies Carrying on Business of Affiliated Insurance) Regulations, and any business of insurance carried on by a cell company in accordance with the provisions of the Companies Act (Cell Companies Carrying on Business of Insurance) Regulations;

(iv) investment services carried on by a person or institution licensed or required to be licensed under the provisions of the Investment Services Act;

(v) administration services to collective investment schemes carried on by a person or institution recognised or required to be recognised under the provisions of the Investment Services Act;

(vi) a collective investment scheme marketing its units or shares, licensed or recognised, or required to be licensed or recognised, under the provisions of the Investment Services Act;

(vii) any activity other than that of a retirement scheme or a retirement fund, carried on in relation to a retirement scheme, by a person or institution registered of required to be registered under the provisions of the Retirement Pensions Act;

(viii) any activity of a regulated market and that of a central securities depository authorised or required to be authorised under the provisions of the Financial Markets Act;

(ix) any activity under (i) to (viii) carried out by branches established in Malta and whose head offices are located inside or outside the EU or the EEA;

(x) any activity associated with any of the above.

The term "*relevant activity*" means the activity of the following legal or natural persons when acting in the exercise of their professional activities:

(i) auditors, external accountants and tax advisors, including when acting as provided for in paragraph (iii) below;

(ii) real estate agents;

(iii) notaries and other independent legal professionals when they participate, whether by acting on behalf of and for their client in any financial or real estate transaction or by assisting in the planning or execution of transactions for their clients concerning the:

a. buying and selling of real property or business entities;

b. managing of client money, securities or other assets, unless the activity is undertaken under a licence issued under the provisions of the Investment Services Act;

c. opening or management of bank, savings or securities accounts;

d. organisation of contributions necessary for the creation, operation or management of companies;

e. creation, operation or management of trusts, companies or similar structures, or when acting as a trust or company service provider;

(iv) trust and company service providers not already covered under paragraphs (i), (iii), (v) and (vi);

(v) nominee companies holding a warrant under the MFSA Act and acting in relation to dissolved companies registered under the said Act;

(vi) any person providing trustee or any other fiduciary service, whether authorised or otherwise, in terms of the Trusts and Trustees Act, other than individual private trustees (in terms of Article 43A of the the Trusts and Trustees Act);

(vii) casino licensees;

(viii) other natural or legal persons trading in goods whenever payment is made in cash in an amount equal to 15,000, soon to be reduced to 10,000, in line with the EU Fourth Money Laundering Directive) or more whether the transaction is carried out in a single operation or in several operations which appear to be linked; and

(ix) any activity associated with any of the above activities.

The PMLFTR cater for two important exceptions to the independent legal professionals' and notaries' duty of reporting a suspicious transaction (this also extends to auditors, external accountants and tax advisors). Accordingly, the duties of reporting to the FIAU will not arise in the case of notaries or independent legal professionals (and auditors, external accountants and tax advisors) with regard to information they receive or obtain in the course of (a) ascertaining the legal position for their client or; (b) performing their duty of defending or representing their client in, or concerning judicial proceedings, including advice on instituting or avoiding proceedings, whether such information is received or obtained before, during or after such proceedings.

The persons who are subject to the PMLFTR must examine with special attention, and to the extent possible, the background and purpose of any complex or large transactions, including unusual patterns of transactions, which have no apparent economic or visible lawful purpose and any transactions which are particularly likely, by their nature, to be related to money laundering or the funding of terrorism. They must also pay special attention to business relationships and transactions with persons, companies and undertakings, including those carrying out relevant financial business or a relevant activity, from a non-reputable jurisdiction.

Each person or body corporate subject to the PMLFTR must designate a money laundering reporting officer ("MLRO") who must be an official of the subject person and a person of sufficient seniority within the organization and to whom a report is to be made of any information or other matter which gives rise to a knowledge or suspicion that another person is engaged in money laundering or the funding of terrorism. The MLRO has the duty to promptly assess any initial report received and make a report to the FIAU where a suspicion arises and to respond to any request for information made by the FIAU. The MLRO is required to complete an annual compliance report which is then submitted to the FIAU within the time frame laid down in the IP.

Any official or employee of a person or body corporate subject to the PMLFTR who discloses to the client or to a third party not being the MLRO that an investigation is being carried out or that information has been transmitted to the FIAU pursuant to the provisions of the PMLFTR is guilty

of an offence and liable on conviction to a fine (multa) not exceeding 50,000 or to imprisonment for a term not exceeding 2 years or to both such fine and imprisonment.

It is evident that for law firms large and small the peremptory nature of primary and secondary anti-money laundering and counter terrorist financing legislation as well as the severe penalties for their breach imposes a considerable compliance onus which makes it indispensable for them, their members and employees to be not simply aware of but highly knowledgeable about their obligations under the legislation now in place. At the very least, and from one perspective, the reputational issue (effectively one of several) for the legal profession must be given a high priority. The favoured risk-based approach to money-laundering and funding of terrorism is no panacea as it is will increasingly involve lawyers in probabilistic risk assessment and risk management – a discipline in which lawyers would usually have no specific training for but which can absolutely not be ignored.

14.11.3 Data Protection

The processing of personal data is regulated by means of the Data Protection Act (Chapter 440 of the laws of Malta, hereinafter referred to as the "DPA") which transposes the provisions of Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data. The DPA shall be superseded from 25th May 2018 with the coming into force of the General Data Protection Regulation ("GDPR").

The GDPR shall harmonise the protection of personal data throughout the EU and clarify the obligations of data controllers especially in regard to obtaining the consent of data subjects.

In particular, the GDPR introduces more stringent requirements in relation to the consent which must be provided by data subjects (that is the individuals to whom the personal data collected relates), establishing that consent based on mere acquiescence or lack of action is no longer valid for data protection purposes. Consent must be given by a clear affirmative act "establishing a freely given, specific, informed and unambiguous indication of the data subject's consent to the data processing activities."

The GDPR clarifies the rights of data subject, and introduces new rights, such as the right to be forgotten and the right to data portability.

The GDPR provides more onerous obligations on data controllers and processors and a number of data controllers and processors in Malta are in the process of reviewing their data protection practices and policies which are directly affected by the provisions of the GDPR.

14.11.4 Corporate Service Providers

As an EU Member State Malta regulates Company Service Providers (hereinafter referred to as "CSPs"). CSPs must be fit and proper persons and must be registered with the MFSA.

Any person who by way of business incorporates companies, provides directorship or company secretarial services, or registered office or business or administrative address services, to companies is, subject to a number of exceptions, deemed to be a CSP.

The MFSA has also published a set of rules to regulate CSPs. These impose a number of obligations which CSPs should fulfil on an ongoing basis.

Persons wishing to operate as a CSP in or from Malta must complete an application form and submit it to the MFSA and this should include all information, documentation and details specified in the *Rules for Company Service Providers* issued by the MFSA. Together with the application form, the MFSA requires the submission of a number of documents and procedures manuals which, unless already available, will need to be developed. MFSA has a 6 month period within which to process an application though this period will not start to run before MFSA is in receipt of all the documents it requires.

In order to register a person as a CSP, the MFSA must be satisfied that the applicant for business is a fit and proper person who is resident or operating in or from Malta and who provides company services by way of business. In any case, the MFSA has the authority to conclusively determine whether the carrying out of a particular activity requires registration under the Act.

Once an entity is registered as a CSP, there are some ongoing tests which it is required to fulfill. The directors, the controller, senior managers, qualifying shareholders or any other persons who direct or will direct the business of the CSP, or who manages or will manage the affairs of the CSP, are required to be and to remain fit and proper and any changes in these roles as well as changes to the constitutive documents of a legal entity registered as a CSP require notification to and approval by the MFSA before becoming effective. The MFSA will also publish on its website a register of all CSPs registered with it, showing the names of the registered CSPs and contact details.

A CSP must:

(i) appoint a Compliance Officer and a Money Laundering Reporting Officer;

(ii) document a number of procedures such as those for decision-making;

(iii) abide by general organisation requirements which will enable the CSP to carry out its business in accordance with the Rules for Company Service Providers and the Company Service Providers Act (Chapter 529 of the laws of Malta) and to carry out its business in a prudent and effective manner. CSPs must have in place decision making procedures and clear reporting lines, plans for staff training and compliance procedures. Furthermore, CSPs are obliged to employ competent staff, keep adequate record of business and internal procedures, and have in place sound work procedures;

(iv) have in place a client agreement which outlines the services to be provided, the fee related thereto as well as clear reporting lines. Such agreement must be executed with each client of the CSP who must retain evidence of such client agreement;

(v) keep client funds separate from own funds. Client funds may also not be co-mingled;

(vi) abide by the obligations in relation to customer acceptance and due diligence outlined in the Rules for Company Service Providers. CSPs must here note that the obligations outlined in the Rules apply in addition to the FIAU's implementing procedures.

CHAPTER 15: SHIPPING AND SHIP FINANCE

15.1 The Malta Flag

The Malta Flag has over the years cemented itself as the leading EU flag in terms of tonnage and offers a wide range of shipping services as it has a shipping community composed of specialised lawyers, agents, shipbuilding and ship repair service providers, bunkering and supply services providers as well as an established Freeport.

The Malta Flag formally came into existence as an "open" register in 1973 with the promulgation of the Merchant Shipping Act (Chapter 234 of the laws of Malta, hereinafter referred to as the "Shipping Act"). It has experienced significant growth since its inception and despite the turbulence in the shipping world, it has managed to consistently maintain a steady year-on-year growth. Malta's accession to the EU in 2004 has gone a long way towards making the Flag more attractive to operators and charterers alike. The administration of the Malta Registry of Shipping and Seamen (the "Shipping Registry") is focused on ensuring the safety of life at sea and the prevention of pollution as well as compliance of Maltese registered vessels with international maritime conventions.

15.2 Advantages to Shipowners

The following are some of the advantages and benefits of using the Malta Flag:

- The Malta Flag has for some time established itself as an EU flag of repute, and adheres to the International Maritime Organization ("IMO") and the EU's acquis of cleaner and safer seas;
- Malta is a member of the Paris MoU and is well placed on its White List;
- Maltese Shipping Organisations enjoy various fiscal exemptions in respect to income related to shipping activities carried out by them, in line with EU State-aid guidelines;
- It is possible to register vessels which do not fall within the strict definition of ships, such as oil-rigs, floating docks, pontoons and barges;
- There are no restrictions on the nationality of the master, officers and crew serving on board Malta-flagged vessels;
- There are no restrictions on the nationality of shareholders and directors of Shipping Organisations;
- Company incorporation costs are low and the registration fees are highly competitive;
- Maltese shipping laws and regulations are very pro-creditor, and creditors enjoy high ranking and easy enforcement over mortgages registered in Malta;
- Procedures for the registration or deletion of vessels as well as for the registration and discharge of mortgages are user-friendly and uncomplicated;
- The Shipping Registry and its officers are available 24/7 in respect to urgent matters;
- A global network of consular offices offer constant support to ship operators;
- A number of double taxation and bilateral maritime agreements with other maritime nations are in force;
- No trading restrictions are imposed on vessels registered under the Malta Flag;
- Malta is a politically stable democracy which guards against arbitrary changes to applicable laws and regulations.

15.3 Ownership of Malta Flag Vessels

15.3.1 No Restrictions on Nationality of Ownership

There are no nationality restrictions on the ownership of a vessel, so Malta flagged vessels may be owned by both local and foreign legal entities, as well as all Maltese and EU citizens.

15.3.2 Ship Owning Entities: Shipping Organisations

There are no restrictions on the basis of nationality with regard to shareholding in Maltese Shipping Organisations. A typical Memorandum and Articles of Association of a Shipping Organisation would include the following elements:

(i) The name of the company; the word "Limited" or "Ltd." is always inserted at the end of the chosen name;

(ii) Name and particulars of each shareholder (a minimum of one), whether individuals or bodies corporate;

(iii) The minimum share capital of a Company is of 1,200 which can be 20% paid up; the share capital of a Shipping Organisation may be denominated in any convertible currency;

(iv) Name and all particulars of the director/s (a minimum of one);

(v) Any special instructions on company structure, voting rights etc.

A Shipping Organisation may be a foundation, or may also operate under a trust.

15.3.3 Ship Owning Entities: EU Citizens and International Owners

International owners (EU/ EEA citizens or a foreign corporate body recognised by the Shipping Registrar (or "Registrar") as validly constituted under the laws of its State of establishment) must appoint a Resident Agent who is habitually resident in Malta and who satisfies the Registrar that he may carry out the duties expected of him. The procedure and documentation required for such appointment are relatively straightforward and standardised.

The following documentation would also have to be provided:

(i) in the case of an EU Citizen:

a. a certified true copy of the individual's passport;

b. an original Declaration of Appointment of Resident Agent in Malta, duly notarised and legalised by apostille;

c. the Memorandum and Articles of Association or a copy of the identity card of the Maltese Resident Agent (as applicable);

d. a good-standing certificate the of Maltese Resident Agent (as applicable); and

e. an acceptance of appointment by the Maltese Resident Agent.

(ii) in the case of a foreign body corporate:

a. a certified copy of its Memorandum and Articles of Association or other constitutive documents thereof (or a certified true copy thereof attached to a legal opinion on the contents of the Memorandum and Articles of Association);

b. a recent good-standing certificate and a certified copy of its certificate of registration;

c. an original Declaration of Appointment of a Resident Agent in Malta, duly notarised and legalised by apostille;

d. Powers of Attorney (if and when required);

e. a legal opinion, duly notarised and legalised by apostille, confirming that the corporate records of the corporate body or entity have been examined and giving the details of the directors and holders of office and of persons authorised to represent the corporate body or entity and to bind it with their signature and to appoint a Resident Agent (usually a specimen opinion is tendered in this respect);

f. the Memorandum and Articles of Association or a copy of the identity card of the Maltese Resident Agent (as applicable);

g. a good-standing certificate of the Maltese Resident Agent (as applicable); and

h. an acceptance of appointment by the Maltese Resident Agent.

15.4 Registration of Ships

Ships intending to fly the Maltese Flag must be registered with the Shipping Registry in the Merchant Shipping Directorate of Transport Malta. Registration takes place in two stages. The vessel is

first "provisionally" registered and, upon satisfaction of certain requirements, it is then registered "permanently".

15.4.1 Provisional Registration

The following is a list of the principal requirements for provisionally registering a vessel in Malta:

(i) an application for the registration of a vessel under the Malta Flag, giving the vessel's descriptive details including:

a. Present name, and if a change of name is intended, the proposed name (a name may be reserved beforehand);

b. Propulsion (steam or motor);

c. Service (dry cargo, tanker, pleasure yacht, etc.);

d. Details as to whether the vessel has ever been registered in Malta;

e. Country under laws of which the ship was last documented;

f. Classification Society;

g. Proposed date of registry;

h. Port where the ship will be at time of registry;

i. Number of seamen and apprentices for whom accommodation is certified;

j. Gross tonnage;

k. Net tonnage;

l. Length (metres);

m. Breadth (metres);

n. Depth (metres);

o. Description of stem and stern;

p. Framework;

q. Number of decks;

r. Number of masts;

s. Number of bulkheads;

t. Where and when built;

u. Full name and full address of builders;

v. Number, type and description of engines;

w. Number of cylinders;

x. Power of Engines;

y. Full name and full address of engine makers; and

z. Name and office address of ship's manager (including telephone and fax numbers).

(ii) valid Maltese endorsements of the Certificates of Competency of the master and officers to serve on board (if available). Alternatively, as a minimum, there must be (for each officer) an acknowledgement issued by Transport Malta of receipt of the relative application accompanied by certified copies of the seaman's passport, medical certificate, certificate of competency and relative endorsements under the applicable Convention, one coloured photograph and the relative funds;

(iii) an copy of a completed application for the issuance of a Minimum Safe Manning Certificate in respect of a Malta-flagged vessel;

(iv) a Declaration of Maritime Labour Compliance ("DMLC") in accordance with the Maritime Labour Convention;

(v) an email from the vessel's Classification Society indicating:

- the current name and Class I.D. No.;
- the IMO number;
- the Class notation (i.e. bulk carrier, oil tanker, chemical tanker or passenger vessel etc.) held by the vessel;
- the validity dates of all statutory (Load Line, SOLAS and MARPOL) certificates held by the vessel); and
- a clear specification of any exemptions and/ or conditions granted or imposed in respect of the said statutory certificates; if no exemptions and/or conditions have been granted under the current flag

jurisdiction, this must be clearly indicated by the Classification Society;

(vi) an email from the technical managers attaching a scanned copy of the current DOC Certificate held by the intended technical managers of the vessel;

(vii) in the case of vessels intended to carry 1,000 tons of oil or more as cargo, a faxed copy of the Blue Card issued by the relevant P & I Club to permit issuance of the CLC Certificate;

(viii) a copy of the vessel's Bunker Blue Card in accordance with the 2008 Bunker Convention;

(ix) a copy of the vessel's Wreck Removal and MLC Blue Card, in accordance with the 2007 Wreck Removal Convention;

(x) the AAIC Number of the Accounting Authority entrusted with the handling of radio traffic accounts will be needed in respect of the Provisional Ship Radio Station Licence;

(xi) funds for payment of registration fees and other ancillary fees and charges;

(xii) confirmation that legal title of the vessel has passed to the new owner free from encumbrances (or otherwise); a scanned copy sent by email of the Bill of Sale and the Protocol of Delivery and Acceptance from the last registered owner to the new owner and a fax copy of the extract or Transcript of Register from the out-going flag administration would normally suffice for this purpose;

(xiii) a Declaration of Ownership (which needs to be filed with the Shipping Registry together with the form of Application for Registration) is usually signed by an authorised representative of the owner in Malta at the Shipping Registry, in the presence of a Shipping Registry official;

(xiv) details of the Designated Person Ashore ("DPA") and the Company Security Officer ("CSO") are to be forwarded to the Shipping Registry;

(xv) confirmation on the ISM Manager's letterhead that the vessels are free from Halon, CFCs and HCFCs;

(xvi) class confirmation that the safety certificates are free from recommendations and/or exceptions and/or equivalencies (otherwise details are required);

(xvii) Ballast tanks' coatings condition from Class and/or managers;

(xviii) Copy of a valid Class certificate;

(xix) Copy of IOPP together with supplement;

(xx) Name and address of agents to arrange for the inspections; and

(xxi) Time-line and name of Port where the inspections are to take place.

15.4.2 Permanent Registration

In order to qualify for "*permanent*" registration status, the following requirements must be satisfied:

Within one month of provisional registration, renewable for good reason by another one month, the following documents must be presented:

- the Deletion Certificate (original) from the previous register, translated into the English Language as necessary; and
- the Bill or Bills of Sale (original) transferring legal title of ownership from the last registered owner appearing on the previous register to the current owner; and

within 6 months of provisional registration, renewable for good reason for an aggregate of another 6 months, the following documents must be presented:

- the vessel's Carving and Marking Note, duly endorsed as required.
- a Radio Licence Application Form, duly completed with all the descriptive particulars of the equipment installed on board, together with a copy of the current valid Safety Radio Certificate and accompanying Form R as issued to the vessel by its Classification Society and an EPIRB test report;
- a certified copy of the International Tonnage Certificate as issued to the vessel in terms of the applicable 1969 Convention on behalf of the Government of Malta and an original

Certificate of Survey issued in respect of the vessel in terms of Article 14 of the Shipping Act;

- confirmation by a Classification Society of the validity of the statutory certificates as issued to the vessel on behalf of the Government of Malta; and
- the owner's or technical manager's undertaking to return the Provisional Certificate of Malta Registry to the Shipping Registry as soon as possible, and, in any case, within 30 days of receipt of the Permanent Certificate of Malta Registry.

A Permanent Certificate of Malta Registry is only valid for one year and is renewable annually on payment of the relative tonnage tax. A Classification Society would also be required to send an email or fax to the Shipping Registry updating the validity dates of all the statutory certificates (Load Line, SOLAS and MARPOL), including those required under the ISM Code and the ISPS Code. If other Classification Societies are entrusted with certification under the Codes, then separate confirmation/s to the Shipping Registry would also have to be sent by email or by fax.

15.4.3 Continuous Synopsis Record

The ISPS Code requires most Malta-Flagged SOLAS vessels to have a Continuous Synopsis Record ("CSR"). The ISPS Code permits vessels transferring flag up to 3 months in which to obtain a new CSR from the new flag state provided the master meanwhile files a temporary CSR Form No.2.

To obtain the CSR from the Shipping Registry, the operator must:

- file a copy of a valid International Ship Security Certificate issued by a Classification Society under the authority of the Maltese administration; and
- ensure that a copy of the full CSR File is faxed to the Shipping Registry by the authorities of the previous flag.

15.5 Bareboat Registration

Under the Shipping Act, a bareboat charter is a contract where a charterer takes full control and possession of a vessel for a specific period of time. A charterer has the right to appoint the ship's master and crew, but he may not sell or mortgage the vessel.

15.5.1 Bareboat Registration 'In'

Maltese law allows for a vessel's bareboat charterer to register its title under the Malta Flag in situations where the ownership of the vessel is already registered in another compatible registry. A Vessel may be bareboat charter registered under the Malta Flag provided that:

- the vessel's ownership is not registered under the Malta Flag;
- the vessel is not registered in another bareboat charter registry.

The following documents must also be submitted to the Shipping Registrar:

(i) an application for the bareboat charter registration of the vessel, giving the descriptive details of the vessel;

(ii) an application for the issuance of a Minimum Safe Manning Certificate in respect of the vessel;

(iii) a declaration of bareboat charter made by the charterer or his agent;

(iv) a copy of the bareboat charter agreement (not to be made available for public inspection);

(v) a scanned copy sent by email of the vessel's current International Tonnage Certificate (1969);

(vi) an email from the vessel's Classification Society indicating:

- the current name and Class I.D. Number;
- the IMO Number;
- the Class notation (i.e. bulk carrier, oil tanker, chemical tanker, passenger vessel, etc.) held by the vessel;
- the validity dates of all statutory certificates (Load Line, SOLAS and MARPOL) certificates held by the vessel; and
- clear specification of any exemptions and/ or conditions granted on the said statutory certificates; if no exemptions and/ or conditions have been granted under the authority of the underlying registry it must be clearly stated by Class;

(vii) an email from the Classification Society entrusted with the certification in terms of the ISM Code, attaching a copy of the current DOC Certificate held by the intended technical manager of the vessel, and undertaking to carry out the necessary audits and issue the relevant SMC Certificate to the vessel immediately upon delivery to the charterer and transfer of flag;

(viii) an email from the Classification Society entrusted with the certification in terms of the ISPS Code undertaking to issue the ISSC;

(ix) the AAIC Number of the Accounting Authority entrusted by the charterer with the handling of radio traffic accounts of the vessel for the Provisional Ship Radio Station Licence;

(x) A recent extract or Transcript of Register of the underlying registration of the vessel containing the descriptive particulars of the vessel, its ownership and, where applicable, all registered mortgages and encumbrances of the vessel; and

(xi) the consent in writing for the vessel to be bareboat charter registered in Malta of:

a. the competent authorities of the underlying registry who may be further required by the Shipping Registrar to declare that, during the period of bareboat charter registration, the vessel will not be entitled to fly the flag of the underlying registry;

b. the owners of the vessel (as registered with the underlying registry),

c. all registered mortgagees (if any).

With the exception of (a) above, the consent documents under this head must contain notarial certification of each signatory's identity and authority to bind the respective party on whose behalf the signatory acts.

It is important to note that (a) the operation of the vessel falls under the jurisdiction of the bareboat charter registry while (b) all matters of title over the vessel, mortgages and encumbrances continue to be governed by the underlying registry and no mortgages or encumbrances may be registered in the bareboat charter registry.

Bareboat charter registration may not exceed the duration of the charter itself or the expiry date of the underlying registration, whichever is the shorter period.

15.5.2 Bareboat Registration 'Out'

Vessels whose ownership is registered in Malta may be bareboat charter registered into a foreign registry with the Registrar's consent, provided that the bareboat charter registry is a compatible registry.

The following documents must also be submitted to the Shipping Registrar to his satisfaction:

(i) an application for bareboat charter registration in the foreign registry made by the owners of the Maltese vessel containing such information as may be required by the Shipping Registrar (e.g. contact details of the registry official in the bareboat charter registry);

(ii) the consent in writing of all registered mortgagees, if any;

(iii) a written undertaking by the owners to surrender the Certificate of Malta Registry issued under the Shipping Act within 30 days from entry into the bareboat charter registry;

(iv) a written undertaking by the charterer that the vessel will not hoist the Malta Flag during the period of the bareboat charter registration, nor show VALLETTA as the Home Port on her stern; and

(v) a copy of the bareboat charter agreement.

The consent granted by the Shipping Registrar for such bareboat charter registration into a foreign registry has a maximum validity of 2 years, unless terminated earlier on the lapse of the charter party. The Registrar may, after its lapse, extend his consent for a further period of 2 years.

Owners are to notify the Shipping Registrar of any amendments or modifications to the bareboat charter within 7 days of such amendment, and send a transcript of the underlying registration showing such amendments within 30 days.

No change of name in the bareboat charter registry may be effected without the consent of the Registrar and of the registered owner and mortgagees. The Registrar may also allow the name of the ship under the Malta Flag to change, so long as it is also changed in the foreign bareboat charter registry.

The owner must immediately notify the Registrar of the bareboat charter registration, and, within 30 days, surrender the Certificate of Malta Registry and deliver an extract or Transcript of Registry issued by the bareboat charter registry.

Within 15 days from the entry into the bareboat charter registry, the owner must also produce proof to the Shipping Registrar that the name of the foreign home port has been marked on the stern of the vessel instead of the name VALLETTA, generally through a Carving and Marking Note issued by the Shipping Registrar and endorsed by an attending class surveyor.

It is here also important to note that whereas the operation of the vessel falls under the jurisdiction of the bareboat charter registry, all matters of title over the vessel, mortgages and encumbrances continue to be governed by the underlying registry and no mortgages or encumbrances may be registered in the bareboat charter registry.

15.5.3 Compatible Registries

- The compatible registries for Bareboat Charter Registration are the following:
- Antigua and Barbuda
- Bahamas
- Belgium
- Belize
- Bermuda (over 24m in length)
- Bulgaria
- Cambodia
- Canada
- Canary Islands
- Cayman Islands
- Commonwealth of Dominica
- Cyprus
- Denmark – 1. Danish International Registry of Shipping
- Denmark – 2. Traditional Danish Registry of Shipping
- Estonia
- Faroe Islands
- France
- Georgia
- Germany
- Gibraltar
- Isle of Man
- Italy
- Italian International Ship Registry
- Republic of Kazakhstan
- Latvia
- Liberia
- Lithuania
- Madeira International Ship Register
- Marshall Islands
- Moldova
- Netherlands
- Nigeria
- Panama
- Poland
- Romania
- Russian Federation
- Russian International Ship Register
- Singapore
- Spain
- St Kitts & Nevis
- St. Vincent and the Grenadines
- Turkey
- Ukraine
- Vanuatu

The following registries are compatible only for bareboat charter registration "*out*":

- Brazilian Special Registry (R.E.B.)
- Islamic Republic of Iran
- Philippines
- Portugal
- United Kingdom
- Venezuela

The Luxembourg registry is compatible for bareboat charter registration "*in*", and also for registration "*out*", the latter being subject to the condition that vessels must be owned to the extent of more than 50% by residents of the EU or by commercial companies which have their registered office in a member state of the EU.

The Registrar may, at the request of the charterer or his authorised agent, extend the registration for the remaining period of the charter or until the expiry date of the underlying registry, whichever is the shorter period, but in no case in excess of 2 years at a time, provided he has not received any

objections to this extension from the appropriate authorities of the underlying registry, the owners and the registered mortgagees, if any, within 7 days from the Shipping Registrar having informed them of such request for extension.

15.5.4 Termination of Bareboat Charter Registration

Bareboat charter registration *"in"* will (or may be) terminated or revoked in the following circumstances:

(i) where the Minister has ordered such closure in the national interest or in the interest of Maltese shipping;

(ii) where the Shipping Registrar has directed such closure for any of the following reasons:

a. the annual fees have not been duly paid in accordance with the Shipping Act;

b. the formalities in relation to the documents and evidence after provisional registration are not complied with within the maximum periods allowed;

c. a registered ship is either actually or constructively lost, taken by the enemy, burnt or broken up, or ceasing, whether by reason of a transfer to persons not qualified to own a Maltese ship or for any other reason, to be a Maltese ship;

d. the owner fails to observe the provisions of the Shipping Act;

e. it is established that the ship will not or cannot be registered under the Shipping Act;

f. where required, any conditions established by the Minister are not observed for a period of over a month;

g. the owner fails to pay any fine imposed under the Shipping Act, or fails to pay any penalty within one month of being demanded in writing by the Shipping Registrar; or

h. the owner fails to be in possession of a valid certificate of registry, whether provisional or otherwise, for a period in excess of one month.

(iii) a voluntary closure of registry has been requested and such request has been accepted by the Shipping Registrar;

(iv) the appropriate authorities of the underlying registry, or the owners, or any of the mortgagees, if any, have withdrawn their consent to the bareboat charter registration in Malta;

(v) the registration in the underlying registry has for any reason been terminated;

(vi) the charter lapses or is terminated by any of the parties to it; or

(vii) the period for which the ship has been bareboat charter registered lapses and no extension has been granted.

Bareboat charter registration *"out"* may be terminated in the following circumstances:

- if the Minister orders the Registrar to withdraw consent in the national interest;
- if the conditions for bareboat charter registration "*out*" are not fulfilled; or
- if the charter period lapses or is terminated.

The owner must make a declaration that the bareboat charter certificate will be surrendered to the foreign registry within 30 days of termination, and the Registrar will return the certificate of registry which was surrendered to it prior to the bareboat charter registration. The owners have 30 days to produce a transcript of extract from the foreign registry showing that the bareboat charter registration has been cancelled.

15.6 Vessel Age Eligibility and Pre-Conditions for Registration

15.6.1 Compulsory Age Restrictions

The Shipping Registry has introduced the following compulsory provisions:

(i) as a rule, trading vessels of 25 years and over are not permitted to be registered. Applications for the registration of trading vessels of less than 25 years are considered subject to:

a. the vessel being either in class or in the process of being classed with a

recognised Classification Society; and

b. the receipt of an up-to-date class survey status report or information on the validity of the current statutory certificates including details of any existing exemptions and/ or conditions, relating to both class and statutory certificates.

(ii) registration of trading vessels of 15 years and over but less than 25 years are also subject to the outcome of a prior inspection by an authorised flag-State inspector; the Shipping Registry may require the inspection to be carried out in dry-dock.

(iii) vessels of 10 years and over but less than 15 years must also be presented for an inspection by an authorised flag-State inspector within one month of registration; owners may opt to have their vessel inspected prior to registration;

(iv) a negative outcome of an inspection of a registered vessel may lead to the immediate closure of the vessel's Register.

The final decision on a vessel's seaworthiness and acceptability for registration remains exclusively at the discretion of the Shipping Registry.

Vessels under 10 years of age enjoy reductions on registration fees and on annual tonnage tax. Such reductions are even more favourable for vessels under 5 years of age. Vessels 10 years of age and over suffer an increase in the annual tonnage tax on the sole basis of age.

15.7 Authorised Classification Societies

The recognised Classification Societies authorised to issue statutory certificates on behalf of the Government of Malta are the following:

- American Bureau of Shipping
- Bureau Veritas
- China Classification Society
- Class NK
- Croatian Registry of Shipping
- Det Norske Veritas
- Korean Register of Shipping
- Lloyd's Register
- Polish Registry of Shipping
- Registro Italiano Navale (RINA)
- Russian Maritime Register of Shipping

15.8 Crewing

Under Maltese law there are no restrictions on the nationality of crew members employed on board Maltese vessels. Seafarers must necessarily be 16 years of age or older; the Minister is permitted to make specific provisions for all those under 18 years of age, which the ship operator must adhere to.

Crew persons must possess sufficient knowledge of the English language. Persons who intend to be employed on board a Maltese vessel must undergo a prior medical assessment and be certified to be fit for such employment. Ship operators must enter into an employment agreement with their crew to regulate matters such as wages, leave, and regulations relating to misconduct. A copy of such must be made available to the crew at all times.

The Maritime Labour Convention (MLC) has been transposed into Maltese law and seeks to ensure that standards are maintained in order for crew members to have an optimum working environment on board Maltese vessels. Malta is also signatory to and has ratified the International Convention on Standards of Training, Certification and Watchkeeping of Seafarers (STCW), and has also signed a number of bilateral treaties with other nations regarding the recognition of STCW Certificates. Such agreements all ensure that crew members maintain proper standards of certification and education on board a Maltese vessel. Such instruments aim to secure favourable employment conditions, whilst protecting the economic interests of ship operators.

The following shows in a schematic fashion the manning complement in respect of Malta Flag vessels:

Deck Department

Gross Tonnage	Under 500	500-999	1000-1599	1600-2999	3000-4999	5000-14999	15000 & over
Master	1	1	1	1	1	1	1
Chief Officer	1	1	1	1	1	1	1
OOW Nav	-	-	1*	1*	1	1	2

* In restricted trade, one OOW Nav may be omitted

Deck Rating	2	2	3	3	4	5	6

Note: At least 2 Deck Officers must be holders of a recognised GMDSS (GOC), or otherwise the vessel must carry a dedicated Radio Officer holding at least a recognised GMDSS General Operators' Certificate (GOC).

Engine Department

Kilowatts	350-750	751-1500	1501-3000	3001-7450	7451-11200	11201 & Over
Chief Engineer	1	1	1	1	1	1
Second Engineer	1*	1*	1	1	1	1

*On ships with a UMS Certificate, one Second Engineer may be omitted

OOW - Engine	-	-	1*	1*	1*	2*

*On ships with UMS Certificate, one OOW – Engine may be omitted

Engine Rating	1	1	2*	3*	3*	3*

*On ships with a UMS Certificate, one Engine Rating may be omitted

Note: On tankers of 1000 Gross Tonnage and over, an extra Engine Rating is required.

15.9 Taxation

A company is considered to be a "shipping organisation" if its principal objects include, inter alia, the ownership, operation (under charter or otherwise), administration and management of a ship or ships registered as a Maltese ship in terms of the Merchant Shipping Act and the carrying on of all ancillary financial, security and commercial activities in connection therewith.

A "tonnage tax ship" is defined as a ship declared to be a tonnage tax ship by the Minister in terms of the Shipping Act, or a Community ship of not less than 1,000 net tonnage which is owned entirely, chartered, managed, administered or operated by a shipping organisation.

A company that benefits from the tonnage tax regime should pay an annual tonnage tax for each vessel computed by reference to its net tonnage and the year of its build. The company will still be required at law to compile and keep proper accounting records, but as the law stands today, these accounts do not need to be filed or registered with the Maltese Tax Authorities or the Maltese Registry of Companies.

15.10 Ship Mortgages

Maltese law on ship mortgages is modelled closely on the equivalent English law, and consequently practitioners in Anglo-Saxon jurisdictions find much common ground with our ship-finance provisions, especially insofar as enforcement remedies are concerned. Practically all the leading international ship finance banks and credit institutions have taken Maltese mortgage security at some time or another, while a significant number of such banks and credit institutions do so on a regular and consistent basis.

15.10.1 Security over Vessels

A ship may constitute security for a debt or other obligation either by agreement or by operation of law:

- by means of a mortgage which is a special charge over a vessel; or
- by a general hypothec which attaches to all the assets of a debtor, including any vessel such debtor may own; or
- by a special privilege upon the vessel; this arises *ex legem* and no debt or other obligations other than those specified by law can be secured by a special privilege.

There are several advantages in having a Maltese mortgage registered over a Maltese vessel as security for a debt or other obligation of a ship owner, as further detailed hereunder.

15.10.2 Advantages to Financing Parties

The following are some of the advantages and benefits which accrue to mortgagees taking mortgages over Malta flagged vessels:

- mortgages constitute executive titles and may be enforced immediately upon default without the need for a prior court judgement or order to that effect;
- claims secured by a mortgage enjoy a relatively high ranking;
- vessels may not be deleted from the Shipping Register by the owner without the mortgagee's prior written consent;
- a vessel may not be struck off the Shipping Register by the competent authorities without at least one month's notice being given to the mortgagee by the Shipping Registrar; in the event that the vessel is deleted in these circumstances, this is done save for any registered encumbrances and consequently the mortgage continues to attach to the vessel;
- independently from the mortgagee's rights to take possession of and sell the vessel secured by the mortgage upon default, the mortgagee is also empowered to take over and complete the vessel's registration formalities;
- further mortgages or transfers of vessels subject to mortgages, without the prior written consent of the mortgagee, may be prohibited by a specific clause in the mortgage instrument;
- the mortgage attaches to the insurance proceeds and to the proceeds from indemnities for mishaps;
- once a mortgage has been registered at the Shipping Registry, no further steps need to be taken to perfect it;
- mortgage registration is a fast process and provided all the required documents are to the Shipping Registrar's satisfaction, may be completed fairly quickly;
- once a mortgage is registered, special privileges or liens not previously recorded on appurtenances or accessories of a vessel do not affect the mortgagee's position;
- a mortgage may be executed and registered in favour of a security trustee acting under a trust for the benefit of a person or persons or a syndicate to whom a debt or other obligation is due; in such cases, the security trustee is recognised as the mortgagee of the particular mortgage and is entitled to exercise all the rights in relation to that mortgage as are accorded to a mortgagee by the Shipping Act or any other enactment; the trust arrangements do not need to be governed by Maltese law;
- mortgages may be transferred or amended fairly easily; and
- a mortgage may be registered over a vessel currently under construction provided that, when built or equipped, such ship would qualify for registration under the Maltese flag, in terms of the Shipping Act.

15.10.3 Characteristics of Mortgages

Mortgages rank according to the date and time of their registration in the relevant vessel Register at the Shipping Register. More than one registered mortgage may be registered over the same vessel – in such cases, the mortgages will rank by the order of registration, unless the prior ranking mortgagee subordinates its rights in favour of a lower ranking mortgagee.

15.10.4 Registration of Mortgages

The Shipping Act provides for a statutory form of mortgage, which must be used for all types of mortgages (whether securing both principal and interest, or if securing obligations arising out of an account current). Although the mortgage may be drawn up in either English or Maltese, it has become standard practice for Maltese mortgages to be drawn up in English.

When the mortgagor is a body corporate, the person signing the mortgage form on behalf of the said mortgagor must have authority to do so by virtue of (i) the Memorandum and Articles of Association of the company, (ii) resolutions of the board of directors, or (iii) a power of attorney issued pursuant to the resolutions or the Memorandum and Articles of Association. The mortgagor must execute the mortgage in the presence of a named witness on the statutory form. Mortgagors, whether Maltese or foreign bodies corporate, will typically appoint attorneys in Malta to execute the statutory mortgage form in Malta.

Board resolutions and powers of attorney appointing attorneys to execute a Maltese mortgage should be notarised and legalised by apostille. Where this is not possible, the Registrar

may accept lawyers as witnesses to signature, identity and authority, and Honorary Consuls of Malta for legalisation, though one should verify the position in each case.

Scanned copies of the corporate authorities are accepted as long as the originals have been notarised and legalised. Where the mortgagor is a Maltese company, the Shipping Registry also requires a good standing certificate from the Registry of Companies, stating the names of the directors and shareholders, issued as of the date of the relevant resolutions of the company.

Mortgages are only registered at the Shipping Registry in Malta. Only one original statutory mortgage form is delivered and registered. A copy is retained by the Shipping Registrar and certified copies are issued as required. The original mortgage form, duly annotated showing the relevant registration details, is returned to the mortgagee.

A vessel currently under construction may be registered under the Malta Flag, provided that when eventually built or equipped, it would qualify as a ship registrable under the Shipping Act. In the case where a Declaration of Ownership has been completed in respect of the registration of a vessel under construction, and registration in the name and ownership of a particular party has occurred, a mortgage may be registered over such vessel while it is still under construction. The documents required in the case of the registration of a mortgage over a vessel under construction are substantially the same as those required for the registration of a mortgage on a Malta-flagged vessel.

15.10.5 Registration of Amendment Mortgages

A registered mortgage may be amended for any purpose, but it must, at law, be effected for any one or more of the following purposes:

(i) to increase the amount of capital secured by such mortgage; or

(ii) to extend such mortgage to secure any other obligation of the mortgagor, whether as principal or as surety for any other person, in favour of the mortgagee, except where the new obligation qualifies as a future obligation of the mortgagor to the mortgagee secured by the mortgage being within a maximum sum by way of principal stated in the relative mortgage instrument.

With respect to paragraph (1), an agreement to amend and vary the rates of interest payable, the modalities for the calculation of interest including any indices, margin, or market mechanism, the repayment schedule or the currency in which payment is to be made, does not necessitate the registration of an amendment to an existing mortgage.

In order to effect the amendment of an existing mortgage, a statutory amendment mortgage instrument containing the desired amendment/s must be executed by the mortgagor in the presence of a witness. The mortgagee whose mortgage will be amended, must also grant its consent to the said amendment by countersigning the amendment mortgage instrument, in the presence of a witness.

Where any mortgages, other than the mortgage that it is intended to amend, are entered in the vessel's Register, an amendment mortgage cannot be registered unless the consent in writing of all the other mortgagees whose interests may be prejudiced by the registration of the amendment mortgage is produced to the Registrar. The documents required for the registration of an amendment mortgage are substantially the same as those required for a new mortgage with the addition of the above- mentioned consents, where applicable.

The registration of an amendment mortgage may only occur at the Shipping Registry in Malta. One original form is delivered and registered. A copy is retained by the Registrar and certified copies are issued as required. The original amendment mortgage form, duly annotated showing the relevant registration details, is returned to the mortgagee.

There is no statutory obligation to display a copy of the mortgage on board the vessel, but this usually forms the object of a specific contractual stipulation typically found in (if entered into) the deed of covenants collateral to the mortgage.

15.10.6 Registration of Discharges of Mortgages

The discharge of a mortgage ends the obligations of the mortgagor to the mortgagee as far as the security is concerned. A discharged mortgage is substantially a receipt for monies paid. In order to discharge a mortgage, the relevant section on the reverse side of the original statutory mortgage form (which would be in the mortgagee's possession) will need to be completed, signed by the mortgagee's authorised representative and witnessed by a lawyer or notary, who will in turn

certify the signature and authority of the mortgagee's representative. Alternatively, should the mortgagee wish to appoint local attorneys to sign the mortgage discharge on its behalf, a power of attorney, duly notarised and legalised, will be required. In either case, the original mortgage form duly completed, will need to be registered at the Shipping Registry.

Certified true copies of the registered discharged mortgage form are issued by the Shipping Registry and the original discharged mortgage form is returned to the mortgagee.

15.10.7 Mortgage as Executive Title

A registered mortgage is deemed at law to be an executive title where the obligation it secures is a debt certain, liquidated, and due, and not consisting in the performance of an act; or where a maximum sum secured thereby is expressly stated in the instrument creating the security and such figure is recorded in the register for public notice.

The rights of a mortgagee apply to all registered mortgages which secure debts resulting from any account current, overdraft, or other credit facility.

Upon the registration of any mortgage in the Shipping Register, the rights of any mortgagee are not affected by:

- the creation of any separate privilege or charge on any part, appurtenance or accessory of a ship which may attach in virtue of any law; or
- the reservation of ownership rights by a seller of any part, appurtenance or accessory sold to a ship owner under a contract of sale, hire-purchase or any similar contract.

15.10.8 Mortgagee's Rights

In the event of default of any term or condition of a registered mortgage or of any document or agreements referred to therein, the mortgagee, upon giving notice in writing to the mortgagor:

(i) is entitled to take possession of the ship or share therein in respect of which the mortgagee is registered – one should however note that except so far as may be necessary for making a mortgaged ship or share available as a security for the mortgage debt, the mortgagee is not by reason of the mortgage deemed to be the owner of the ship or share, nor is the mortgagor deemed to have ceased to be the owner thereof;

(ii) has absolute power to sell the ship or share therein in respect of which he is registered – however where there are more persons than one registered as mortgagees of the same ship or share therein, a subsequent mortgagee cannot, except under the order of a court of competent jurisdiction, sell the ship or share therein without the concurrence of every prior mortgagee, and if the proceeds of sale, after discharging the mortgage debt show a surplus in his hands, the mortgagee must deposit the same for the benefit of other creditors and of the mortgagor;

(iii) has power to apply for any extensions, pay fees, receive certificates, and generally do all such things in the name of the owner as may be required in order to maintain the status and validity of the registration of the ship.

For the purposes of the aforementioned proceedings, the debtor is deemed to be lawfully served if the application or other act is served on the master of the vessel, or if he is absent from the Maltese Islands, on the local agent appointed for the vessel by the owners or their agent, or in the absence of such local agent on a curator appointed by the Court to represent the debtor and the ship. Furthermore, in the case of Shipping Organisations, all judicial proceedings which are to be served thereon are deemed at law to be properly served if sent by registered mail or served by a court marshal at the registered office of the Shipping Organisation in Malta.

15.10.9 Dispute Resolution

The jurisdiction in which a dispute will be heard is usually dependent on the place where the vessel has been arrested. The law governing the dispute will vary in accordance with the laws chosen under the applicable agreement/s. One would typically expect a Deed of Covenants and a Loan Agreement to express their own choice of law, and this would typically be chosen by the relevant parties. As regards the mortgage deed itself, any dispute arising under the mortgage deed will be subject to the jurisdiction of the country where the ship is arrested, though any such dispute is to be decided according to Maltese law.

15.11 Commercial Yachts and Commercial Cruising Vessels

Malta is rapidly becoming a flag of choice for yacht and superyacht owners. There are now over 500 superyachts of more than than 24-metres in length flying the Malta flag, with the number of registered

yachts increasing significantly when compared to yachts of less than 24 metres in length.

A yacht may be registered in Malta as a *pleasure yacht* or as a *commercial yacht*. There are now more than 230 commercial yachts, with an average length of 31 metres, registered under the Malta flag.

15.11.1 Commercial Yachts

The registration and operation of Maltese commercial yachts is regulated by the Shipping Act, and subsidiary legislation enacted thereunder, together with a code of practice known as the Commercial Yacht Code (the "Code"). Any yacht intended to be registered and operated as a Maltese commercial yacht must comply with the requirements contained in this Code as administered by the Merchant Shipping Directorate within Transport Malta.

The Commercial Yacht Code imposes those standards of safety, pollution prevention and crew welfare which are appropriate for the type and size of yacht, and it therefore does not apply uniform rules across the board. The requirements imposed by the Code were developed whilst considering the relevant IMO Conventions, EU Directives and industry standards.

15.11.2 Key Elements and Qualifying Criteria For Commercial Yacht Registration in Malta

Any type of yacht may be registered as a commercial yacht, including historical, training and racing yachts. The key elements and the qualifying criteria for a commercial yacht (whether motor or sailing yachts) to be registered in Malta include:

(i) Minimum overall length of 15 metres;

(ii) No tonnage limitations;

(iii) Commercial use for sport or pleasure which does not carry cargo and which does not carry more than 12 passengers;

(iv) Initial survey must be carried out by an authorised surveyor or recognised organisation;

(v) Once compliant, a yacht is granted a "*Certificate of Compliance to Trade as a Commercial Yacht*" which is valid for 5 years (subject to an intermediate survey for yachts below 24 metres in length and an annual survey for yachts above 24 metres);

(vi) Yachts of 500 Gross Tonnage and above must be classed by a recognised organisation and maintain class throughout the period of commercial yacht registration;

(vii) No nationality restrictions for master, officers and crew;

(viii) Save for the compliance requirement with the Commercial Yacht Code, the same procedure for registering any other vessel under the Merchant Shipping Act applies to the registration of a commercial yacht;

(ix) Yachts may be owned by:

a. either EU, EEA and Swiss residents residing in Malta and corporate bodies established in Malta; or

b. EU, EEA and Swiss residents not residing in Malta and foreign corporate bodies through the appointment of a local resident agent.

Commercial yachts may operate worldwide subject to navigational notations granted by the Malta flag authorities which navigational notations are based on the type and size of yacht in question.

In addition to the qualifying criteria outlined above, the Commercial Yacht Code addresses a number of matters which warrant particular attention and which provide for an overall flexible regime.

15.11.3 Convenience in Switching from "Commercial" to "Pleasure"

An owner of a Maltese commercial yacht may easily change the yacht's certification from commercial to pleasure, and *vice versa*. This is aimed towards those occassions when a yacht is in use but is not being chartered (i.e. being privately used). When such change takes place (often within short periods of time), the commercial yacht certificates may be retained on board and re-used when the yacht is operated commercially.

15.11.4 Fast track for LY2, LY3 and Codice del Noleggio Certified Yachts

The Commercial Yacht Code allows for a fast-track procedure for LY2, LY3 and *Codice del Noleggio* certified yachts transferring to the Shipping Registry. Such yachts will be issued with an operational commercial certificate upon initial

application and are thereafter given 3 months to complete any necessary surveys and formalities.

15.11.5 Traditional / Historical Yachts

Owing to their very nature, such yachts may not be in a position to comply with all of the requirements set out in the Commercial Yacht Code. Consequently, the Shipping Registry has been willing to make equivalent and tailor made arrangements on a case-by-case basis whilst respecting the historical design and character of such yachts.

15.11.6 Racing Yachts

The Commercial Yacht Code offers flexibility to owners and operators of commercial yachts wishing to participate in races. Commercial yachts need not be fully compliant with the Code during races and during transit passages to and from the race location, provided the Shipping Registry is informed beforehand and all persons on board are covered by a valid insurance policy whilst racing and during the transit passages.

Owners wishing to register their non-commercial yachts as "*racing yachts*" may also do so on a case-by-case basis.

15.11.7 Pleasure Yachts

Maltese law provides for a comparatively simple regime for the registration of yachts designated as "*pleasure yachts*". Pleasure yachts are neither categorised as *commercial* nor *racing*, and are intended solely for private use. There is substantial flexibility in the applicable regime, particularly for pleasure yachts of a smaller size.

15.12 VAT and Yacht Leasing

When a yacht is acquired for personal use by its owner in EU territorial waters, VAT is payable on the acquisition of the yacht or on its importation into the EU.

In order to optimize their tax position, yacht owners may enter into lease arrangements for the leasing of their yachts through Malta (as described below), and accordingly have Maltese VAT and income tax paid in respect of the lease structure.

A Maltese company is incorporated for the purpose of acquiring legal title to the yacht, and registers for Maltese VAT purposes. The Maltese company then leases the yacht to an individual or to another corporate entity in terms of a lease agreement whose term would typically be for 12 months. Malta VAT is only payable on a portion of the lease payments made to the Maltese leasing company owning the yacht. This portion depends on the length and type of yacht. Any yacht with a length in excess of 24 metres will derive the highest benefits as only 30% of the lease payments are subject to Maltese VAT in terms of Guidelines issued by the Malta VAT Department in 2005. The Guidelines provide for varying percentages of deemed use of yachts within EU waters, and the percentages range from a minimum of 30% to a maximum of 90% of the lease payments.

The Yacht Leasing Guidelines issued by the Malta VAT Department set out a number of guiding principles of interpretation by the Maltese VAT Department, taking into account the rules and guidelines in the EU's Sixth VAT Directive (as amended to-date) for the determination of the place of supply of goods and services where the effective use and enjoyment of goods/services takes place outside the EU. It is assumed that any yacht would be partly used within EU territorial waters and partly outside the EU. The Guidelines provide guidance as to the deemed percentage use of a yacht within and outside EU waters. The longer the yacht, the greater the deemed percentage of use outside EU waters which would then fall outside the scope of VAT.

The Maltese VAT Department expects the Maltese leasing company to make a profit on the lease arrangement. This profit would be taxed at 35% in Malta but tax refunds of 6/7 ths of the tax paid by the company would be due to the shareholders upon a distribution of dividends by the company.

A VAT paid certificate is issued by the Malta VAT Department at the end of the lease.

If the yacht is acquired by the Maltese leasing company from a person outside the EU and a yacht leasing arrangement has been approved by the Maltese VAT department, the yacht can then be officially imported into the EU through Malta and appropriate certification will be issued by the Maltese Customs authorities.

CHAPTER 16: AVIATION

Malta has ratified the Cape Town Convention on International Interests in Mobile Equipment and the Protocol to the Convention on International Interests in Mobile Equipment on Matters Specific to Aircraft Equipment

Maltese law on the registration of aircraft and the registration of mortgages over aircraft is regulated by the Aircraft Registration Act (Chapter 503 of the laws of Malta, hereinafter referred to as the "Aircraft Act") which consolidates all the relevant provisions relating to aircraft registration and mortgages into one single act and introduces important innovative concepts to Maltese law (some of which also required amendments to be made to the Civil Code (Chapter 16 of the laws of Malta) and other legislation). In particular, the Aircraft Act implements the Cape Town Convention on International Interests in Mobile Equipment and the Aircraft Protocol ("Cape Town").

The Aircraft Act came into force on the 1st October, 2010 except for the First Schedule (relating to Cape Town, specifically reproducing the Model for National Implementing Legislation prepared by the Aviation Working Group to UNIDROIT) which came into force on the 1st February 2011. The Aircraft Act has encouraged growth in the aviation industry generally, including services relating to finance, leasing and management, insurance, brokerage, maintenance and classification. Meanwhile, Malta's accession to Cape Town enhances Malta's reputation and appeal as an aviation centre.

The authority responsible for the registration of aircraft in Malta is the Authority for Transport, which operates through the Civil Aviation Directorate which is led by a "Director General" to whom all powers relating to civil aviation have been delegated under the Aircraft Act.

16.1 Aircraft Registration

Application for the registration of an aircraft is in writing on a prescribed form accompanied by the required particulars and evidence. An "aircraft" is defined for the purposes of registration as "any machine that can derive support in the atmosphere from the reactions of the air other than the reactions of the air against the earth's surface" but excludes aircraft used in the military, customs or police services of any State. As will be seen below, the definition of "aircraft" is widened for the purposes of mortgages over aircraft under the Aircraft Act to include, inter alia, engines.

16.1.1 Aircraft under Construction

The Aircraft Act also provides for the registration of an aircraft under construction from the moment the aircraft is uniquely identifiable in accordance with the criteria laid down the Aircraft Act. In such cases, unless the manufacturer has expressly agreed otherwise with a buyer, the manufacturer will be considered the owner of an aircraft under construction and, subject to satisfying the requirements in the Aircraft Act, can register the aircraft.

16.1.2 Eligibility to Register an Aircraft

The Aircraft Act sets out the criteria which are to be met for a person to be qualified to register an aircraft. In so doing, it also distinguishes between commercial aircraft and private aircraft.

The following persons are qualified to register an aircraft in Malta:

- the Government of Malta;
- a citizen of Malta or a Member State of the EU or a European Economic Area ("EEA") State or Switzerland, having a place of residence or business in Malta, the EU, the EEA, or Switzerland;

- an undertaking formed and existing in accordance with the laws of Malta or a Member State of the EU or an EEA State or Switzerland and having its registered office, central administration and principal place of business within Malta, the EU, the EEA or Switzerland, whereof not less than 50% of the undertaking is owned and effectively controlled by the Government of Malta, or by any Member State of the EU or by persons referred to immediately above, whether directly or indirectly through one or more intermediate undertakings;
- trustees for such interests (the beneficiaries of the relevant trust would be considered to determine eligibility to register).

Failing the above requirements, a natural or legal person can still register an aircraft provided:

- the individual is a citizen of or the undertaking is established in a member country of the Organisation for Economic Co-operation and Development or in a country approved by the Minister responsible for transport; and
- the aircraft is under construction or the aircraft is not used to provide air services (being the carriage of passengers, cargo and/or mail for remuneration or hire); and
- the person enjoys legal capacity to own or operate an aircraft in terms of the law under which it has been established or registered; and

  the person complies with the requirements established under the Aircraft Act, including any regulations made or guidelines issued under the Aircraft Act; and
- the person satisfies the Director General that it can and will ensure due observance of the laws of Malta relating to civil aviation; and
- the person complies with the requirements applicable to an international registrant in terms of the Aircraft Act - being, *inter alia*, the appointment of a resident agent in Malta for the duration of the registry (this is similar to the practice in shipping registration).

The Aircraft Act thus widens the qualification criteria in the case of private aircraft (and aircraft under construction).

16.1.3 Capacity in which a Person can Register an Aircraft

A person who is eligible to register an aircraft in Malta can register the aircraft in any of the following capacities:

- as the owner of an aircraft who operates the aircraft;
- as the owner of an aircraft under construction or temporarily not being operated or managed;
- as an operator of an aircraft under a temporary title (lease agreement, operating agreement or similar agreement) who satisfies the conditions as may be prescribed;
- as the buyer of an aircraft under a conditional sale or title reservation agreement or similar agreement which satisfies the conditions which may be prescribed and who is authorised thereunder to operate the aircraft.

Both commercial and private aircraft can be registered in Malta.

16.1.4 Trusteeship

Where the applicant for registration is a trustee, no regard shall be had to the nationality of the trustee and the Director General will look to the beneficiaries of the trust in order to determine eligibility to register the aircraft (whilst ensuring confidentiality of the identity of the beneficiaries).

16.1.5 Fractional Ownership

Recognition of fractional ownership

The interest in an aircraft can be divided into shares or other interests as may be specified upon registration of the aircraft. It is not uncommon for title to an aircraft to be split amongst co-owners in specified fractions or percentages. The fact that the Aircraft Act allows for fractional ownership is a practical approach which also allows the separate interests to be financed by different creditors, each of which will take security over the particular fractional interest it has financed.

Where an application for registration is based on ownership and where the interest is vested in more than one person, then at least 50% of the owners of the shares in the aircraft must be eligible as qualified persons. The same rule applies where the applicant is a trustee and reference shall be made to the beneficial interests mutatis mutandis. By contrast, where the application for registration is based on operation of the aircraft and where the operation is being carried out by more than one person, all the operators must be eligible. In the case of private aircraft, the Aircraft Act empowers the Minister to establish different conditions through publication of regulations.

16.1.6 The National Aircraft Register

The National Aircraft Register is a single register (previously two registers were kept: one for aircraft and one for mortgages) which allows for the recordation of more details, including the various interests or titles in an aircraft or its engines.

The Director General is required to include certain particulars in the register of the aircraft, including:

- number of certificate registration;
- nationality marks of the aircraft and registration marks assigned by the Director General;
- name of constructor of aircraft and its designation;
- serial number of the aircraft;
- manufacturer, serial numbers and physical details of the engines attached to the aircraft and any replacement engines designated for use on the aircraft;
- physical details of the aircraft;
- name and address of the registrant and in what capacity the registrant has registered the aircraft;
- details of any mortgages registered over the aircraft and all transactions relating to mortgages registrable in terms of the Aircraft Act;
- details of any irrevocable de- registration and export request authorisation, or any other power of attorney; and
- the ownership rights in the aircraft or an engine, including when (i) held by a trustee, (ii) held by one or more owners, (iii) divided into fractional shares or otherwise, or (iv) held under an agreement with reservation of ownership rights or under certain conditions affecting title as detailed in the Aircraft Act.

The Director General will also note other particulars in the register if requested to do so by the registrant or by any other person (with the consent of the registrant) who demonstrates an interest in such annotation. Such particulars include:

- lessor rights relating to an aircraft or engine where the lessor is different from the owner;
- lessee rights;
- details of the resident agent;
- information on an international interest registered in the international registry under Cape Town (the term “international registry” is used herein to refer to the international registration facilities established by Cape Town and “international register” shall be construed accordingly).

The certificate of registration can also contain additional information upon request: where the registrant is an operator of the aircraft under temporary title or is a buyer of an aircraft under conditional sale or title reservation or similar agreement, any person who holds an interest by way of ownership or title in the aircraft or a share therein can make a request in writing to the Director General to have his name, address and ownership interests or title noted in the certificate of registration.

A Maltese AOC is an internationally recognised AOC (EU OPS) of the highest standard in the industry

16.1.7 Legal Effects of Registration

Registration in the register, by means of record or annotation, has the following legal effects:

- information is rendered public and is considered to be within the knowledge of third parties;
- acts are effective against third parties;
- priority is created between different rights as provided in the Aircraft Act;
- where expressly conditional on registration, it shall create legal effects between parties to certain transactions;
- it shall have all other effects under the applicable law.

16.1.8 Aircraft Companies

The Aircraft Act has also introduced new insolvency rules for "aircraft companies". Aircraft companies are defined as those companies whose centre of main interest is in Malta and whose sole asset is an aircraft or an aircraft engine over which a mortgage or an international interest is registered. In such cases the law provides for beneficial procedural treatment for actions enforcing mortgages or international interests. Holders of mortgages or international interests will here receive supportive treatment in that they can act without interference from the insolvency processes and officers until such time as an enforcement of a mortgage or of an international interest is complete.

16.1.9 Financial Institutions

A specific amendment has been made in the Financial Institutions Act introducing a licensing exemption for companies involved in the financial leasing of ships, aircraft and aircraft engines. When registered in Malta theseentities are exempt from licensing requirements to the extent that they:

- are owned and controlled; or
- are subsidiaries of; or
- are exclusively funded by, and the relevant financial leasing transaction is exclusively financed by;

persons or entities as described in Annex II to Directive 2014/65/EU of the European Parliament and of the Council of 15 May 2014 on markets in financial instruments, or by persons or entities recognized as eligible counterparties in accordance with Article 30 of such Directive.

16.2 Security over Aircraft

The Aircraft Act makes it clear that aircraft constitute a particular class of movables which form separate and distinct assets within the estate of their owners for the security of actions and claims to which the aircraft may be subject. In the case of bankruptcy and/or insolvency of the owner of an aircraft, all actions and claims to which the aircraft may be subject, shall have preference on the aircraft, over all other debts of the estate.

An aircraft can constitute security for a debt or other obligation by agreement or by operation of law.

16.2.1 Maltese Mortgage

The security interests recognised over aircraft registered in Malta include both mortgages as well as leases

For the purposes of the part of the Aircraft Act dealing with mortgages over aircraft, an aircraft comprises:

- all data, manuals and technical records; and
- the airframe, all equipment, machinery and other appurtenances as accessories belonging to the aircraft, which are on board or have temporarily been removed therefrom; and
- any engines owned by the owner of the aircraft whether attached or not, as well as any replacement engines designated for use on the aircraft and owned by the owner of the aircraft but temporarily not attached to the aircraft.

With respect to engines, where an engine has been attached to an airframe but the engine does not belong to the airframe owner, then each owner will retain ownership of the said engine, and the engine shall not accede to the airframe. Also any security over aircraft shall not extend to any engine attached to the airframe when such engine does not belong to the owner of the airframe who has granted the security and this notwithstanding the fact that such engines may be referred to in the mortgage, register or elsewhere.

A registered aircraft or share therein can be made a security for a debt or other obligation by means of an instrument creating a mortgage which is executed by the mortgagor in favour of a mortgagee in the presence of and attested by a witness. A statutory mortgage form is used and a mortgage registered in the national register will be governed by the Aircraft Act and will attach to the aircraft or share in respect of which it is registered until it is discharged. The mortgage can be registered in favour of a security trustee appointed or acting under a trust for the benefit of persons to whom the debt or obligation is due.

A mortgage can secure the payment of a principal sum and interest, an account current, as well as the performance of any other obligation, including a future obligation (in this case provided the mortgagee is a credit institution in an approved jurisdiction). There is no need to indicate the

monetary value of the indebtedness in the mortgage, unless it is intended to secure a future obligation in which case a maximum sum by way of principal for which the mortgage is granted must be expressly stated in the registered mortgage instrument.

Mortgages are recorded in the order of time in which they are produced and the Director General, upon registering the mortgage, will note the day and time of registration on the mortgage instrument. If there is more than one mortgage registered over the aircraft, the mortgages will be entitled to priority, according to the date and time of recordation in the register. As to the relationship between Maltese mortgages and international interests (addressed below) under Cape Town, the Aircraft Act sets out the position as follows: a mortgage registered before the 1 February 2011 retains its priority over any international interest or prospective international interest, however a mortgage registered after such date will rank after an international interest registered in the international registry (even if the international interest was registered subsequent to registration of a mortgage in the national register).

In the event of default of any term or condition in the mortgage or of any agreement referred to therein, a mortgagee may - upon giving notice in writing to the debtor - resort to the following remedies without the need for leave of Court:

- to take possession of the aircraft or share therein;
- to sell the aircraft or share therein (where there are prior mortgages only with the concurrence of every prior mortgagee);
- to apply for any extensions, pay fees, receive certificates and generally do all such things in the name of the owner or registrant as may be required to maintain the status and validity of the registration of the aircraft;
- to lease the aircraft so as to generate income therefrom;
- to receive any payment of the price, lease payments and any other income generated from the management of the aircraft.

Mortgagees are also given various other rights generally throughout the Aircraft Act, most notably with respect to the register and cancellation of same.

A mortgagee can also register a power of attorney granted in its favour by way of security for the de-registration and export of the aircraft. The Aircraft Act clearly declares that a request for cancellation made by an authorised person pursuant to an irrevocable de-registration authorisation or power of attorney which has been registered in the national register or the international registry shall be acted upon in all cases.

16.2.2 Special Privileges

Special privileges arise by operation of law and only those debts or other obligations expressly set out in the law are secured by a special privilege.

The special privileges are specified in the Aircraft Act and the list is notably shorter than it was prior to the introduction of the Aircraft Act. In practice special privileges can be divided into the so-called super priority special privileges (the status and ranking of which does not depend on registration) and the so- called registrable special privileges (which depend on registration as a condition for their continuing existence as a special privilege).

The Super Priority Special Privileges

The following debts enjoy super priority and will rank before any debts secured by a Maltese mortgage or a charge in the international registry (under Cape Town) in the order listed below:

- judicial costs incurred in respect of the sale of the aircraft and the distribution of the proceeds thereof pursuant to the enforcement of any mortgage or other executive title;
- fees and other charges due to the Director General arising under applicable law of Malta in respect of aircraft;
- wages due to crew in respect of their employment on the aircraft;
- any debt due to the holder of a possessory lien for the repair, preservation of the aircraft to the extent of the service performed on and value added to the aircraft;
- expenses incurred for the repair, preservation of the aircraft to the extent of the service performed on and value added to the aircraft;
- wages and expenses for salvage in respect of the aircraft.

The Registrable Special Privileges

The following debts will be secured by a special privilege if they are registered in the international registry and provided the claim is created by the owner of the aircraft or a person authorised by him:

- taxes, duties and/or levies due to the Government of Malta in respect of the aircraft;
- wages and expenses for assistance or recovery in respect of the aircraft.

Upon registration of such privileges in the international register, the person registering the aircraft, its owner or operator will be notified of the registration by the registrant of the privilege.

16.2.3 Possessory Lien or Privilege

An aircraft repairer, aircraft manufacturer or other creditor into whose care and authority an aircraft has been placed for execution of works or other purposes shall have a possessory lien on the aircraft as security for the works done to the extent of the service performed on and value added to the aircraft. A possessory lien entitles the creditor to retain possession of the aircraft until the creditor is paid the debt due to him for the building, repair or similar works carried out.

The possessory lien is extinguished by the voluntary release of the aircraft but shall not be extinguished pursuant to a Court order or a judicial sale. If the sum claimed by the creditor is paid to him or adequate security is deposited in Court, the creditor will be obliged to release the aircraft.

16.2.4 International Interest

Further to Malta's accession to Cape Town, it is possible for an international interest to be registered in the international registry.

An international interest is an interest in an aircraft object granted by the chargor under a security agreement; vested in a person who is the conditional seller under a title reservation agreement; or vested in a person who is the lessor under a lease agreement, in the following aircraft objects:

- airframes (certified to carry at least eight persons including crew or goods in excess of 2750kg);
- aircraft engines (rated at least 550 horsepower in the case of turbine or piston engines, or rated at least 1750lb of thrust in the case of jet propulsion engines); and
- helicopters (certified to carry at least five persons including crew or goods in excess of 450kg).

Cape Town and the relevant provisions in the Aircraft Act will apply when, at the time of the conclusion of the agreement creating or providing for the international interest or a contract of sale, the debtor or seller as applicable, is situated in a Cape Town State. The place where the creditor or buyer is situated is not relevant in establishing applicability. The First Schedule to the Aircraft Act will also apply in relation to a helicopter, or an airframe pertaining to an aircraft, registered in an aircraft register of a Cape Town State which is the State of registry, and where registration is made pursuant to an agreement for registration of the aircraft it is deemed to have been effected at the time of the agreement.

An international interest registered in the international register in accordance with the First Schedule of the Aircraft Act shall be recognised and enforceable under the laws of Malta and shall have the status and all rights and powers specified in the said First Schedule with reference to the aircraft irrespective of whether it is recorded in the national aircraft register or not. Indeed elsewhere in the Aircraft Act, it is stated that an international interest registered in the international registry will be enforceable even in the absence of registration or notation in the national register, and will be regulated by the First Schedule to the Aircraft Act (containing the implementing law in respect of Cape Town) and the law governing its terms.

Subject to priority rules in the Aircraft Act and to Malta's declarations pursuant to Cape Town, an international interest registered in the international register will generally rank prior to a national security interest.

The First Schedule to the Aircraft Act sets out the formal requirements for the constitution of an international interest. Accordingly an interest is constituted as an international interest where the agreement creating or providing for the interest:

- is in writing; and
- relates to an aircraft object of which the chargor, conditional seller or lessor has power to dispose; and
- enables the aircraft object to be identified (this requirement is satisfied by a description of the aircraft object which contains its manufacturer's serial number, the name of the manufacturer and its model designation); and
- in the case of a security agreement, enables the secured obligations to be determined, but without the need to state a sum or maximum sum secured.

In an event of default the chargee of an international interest, may exercise one or more of the following remedies where this has been agreed with the chargor (or where the chargor and

chargee have not so agreed, the chargee may apply for a Court order authorising or directing any of the following remedies):

- take possession or control of the aircraft object charged to it;
- sell or grant a lease of the aircraft object;
- collect or receive any income or profits arising from the management or use of the aircraft object.

Where the chargee proposes to sell or lease the aircraft object, the chargee is required to give reasonable prior notice (being not less than ten working days) in writing to interested persons (being the debtor, any guarantor and any other person having rights in or on the aircraft object who has given notice of such rights to the chargee within a reasonable time prior to the sale or lease).

At any time after default and subject to satisfaction of the relevant requirements, the chargee and all interested persons can agree that the ownership of (or other interest of the chargor in) the aircraft object covered by the security interest will vest in the chargor in or towards satisfaction of the secured obligations.

In the case of default under a title reservation agreement or under a leasing agreement, the conditional seller or lessor may terminate the agreement and take possession or control of the aircraft object to which the agreement relates, or apply for a Court order authorising or directing same.

In addition to the remedies set out above (and in addition to any other remedies permitted by applicable law including any remedies agreed on by the parties, as well as to relief pending final determination) the creditor may, to the extent that the debtor has so agreed, procure the de-registration of the aircraft and procure the export and physical transfer of the aircraft object from the territory in which it is situated. In order to proceed with this, the chargee must (unless he is proceeding pursuant to a Court order) give reasonable prior notice in writing to interested persons. Furthermore the creditor must first obtain the written consent of the holders of any registered interests ranking in priority to his.

The national registry authority is required to honour a request for de- registration and export provided the request is properly submitted by the authorised party under a registered irrevocable de-registration and export request authorisation, and the authorised party confirms (where requested to) that all registered interests ranking prior to its own have been discharged or the holders have consented to the de-registration and export.

Where a creditor has registered an international interest in the international registry, the debtor (being the registrant and, or the owner of the aircraft) can execute and file a prohibitory notice in favour of one or more creditors. This is submitted on a prescribed form and will be recorded in the national register by the Director General. The notice has the effect of prohibiting the recordation of any security interests in the national register by the Director General from that point onwards, until the prohibitory notice is withdrawn. It also has the effect of ensuring exclusive domain for the international register.

16.2.5 Recognition of Foreign Mortgages

A foreign mortgage will be recognised as a mortgage with the status and all rights and powers in the Aircraft Act notwithstanding the fact that it is not entered on a registered aircraft if:

- the mortgage has been validly recorded in the registry of the aircraft or other register of the country under whose laws the aircraft is documented; and
- such registry is a public registry; and
- such mortgage appears from a search of such registry; and
- such mortgage is granted a preferential and generally equivalent status as a mortgage under the Aircraft Act under the laws of the country where the mortgage is registered.

16.2.6 Recognition of Security Interest (Conditional Seller and Lessor)

The Aircraft Act also recognises a security interest which is granted in terms of a security agreement drawn up to secure the rights of a person who is a conditional seller under a title reservation agreement or a person who is a lessor under a lease.

If such a security interest has been registered in accordance with the First Schedule of the Aircraft Act, then in the event of default the holder of the security interest shall, upon giving notice in writing to the debtor, have the power to *inter alia* terminate the agreement and take possession or control of the aircraft to which the agreement relates (without the leave of Court) or apply to the Court to authorise or direct either of these acts.

Several powers are also granted to the holder of such a registered security interest in the context of enforcement.

APPENDIX A: LIST OF EMBASSIES AND CONSULAR REPRESENTATIONS

For a full list of all of Malta's representation overseas and foreign representations in Malta together with the relevant contact details for each representation, please refer to the official source in the 'Representations' tab within the website of the Malta Ministry for Foreign Affairs and Trade Promotion at: https://foreignaffairs.gov.mt/en/Pages/Home.aspx

Maltese Representations Overseas

Malta's principal representations overseas consist of the following:

EMBASSIES

- Austria
- Belgium
- China
- Egypt
- France
- Germany
- Greece
- Ireland
- Israel
- Italy
- Kuwait
- Libya
- Poland
- Portugal
- Russia
- Saudi Arabia
- Spain
- The Netherlands
- Tunisia
- USA

HIGH COMMISSIONS

- Australia
- India
- United Kingdom

CONSULATES GENERAL

- Algeria (Algiers)
- Canada (Toronto)
- Turkey (Istanbul)

Maltese Consular Representations Overseas

A
- Albania
- Algeria
- Argentina
- Armenia
- Australia
- Austria

B
- Bahamas
- Bangladesh
- Belgium
- Bolivia
- Brazil
- Bulgaria

C
- Cameroon
- Canada
- Chile
- China
- Colombia
- Costa Rica

D
- Denmark

E
- Ecuador
- Egypt
- Estonia

F
- Finland
- France

G
- Germany
- Ghana
- Greece
- Guatemala

H
- Hungary

I
- India
- Indonesia
- Iran
- Ireland
- Israel
- Italy

J
- Japan
- Jordan

K
- Kenya
- Korea (South)

L
- Latvia
- Lebanon
- Libya
- Liechtenstein
- Lithuania
- Luxembourg

M
- Madagaskar
- Malaysia
- Mali
- Mauritius
- Mexico
- Moldova
- Monaco
- Montenegro
- Morocco
- Mozambique

N
- Nepal
- The Netherlands
- New Zealand
- Nicaragua
- Norway

O
- Oman

P
- Pakistan
- Panama
- Paraguay
- Peru
- Philippines
- Poland
- Portugal

R
- Romania
- Russia

S
- Kingdom of Saudi Arabia
- Singapore
- Slovakia
- South Africa
- Spain
- Sri Lanka
- Swaziland
- Sweden
- Switzerland
- Syria

T
- Thailand
- Trinidad & Tobago
- Turkey

U
- Uganda
- Ukraine
- United Arab Emirates
- United Kingdom
- United States of America
- Uruguay

V
- Vietnam

PERMANENT REPRESENTATIONS

- Permanent Representation to the United Nations – Geneva
- Permanent Representation to the United Nations – New York
- Permanent Representation to the Council of Europe – Strasbourg

REPRESENTATION

- Malta has a Representative Office in Palestine

Foreign Representations in Malta

FOREIGN DIPLOMATIC MISSIONS ACCREDITED TO MALTA

A

- Afghanistan
- Albania
- Algeria
- Andorra
- Angola
- Antigua & Barbdua
- Argentina
- Armenia
- Australia
- Austria
- Azerbaijan

B

- Bahamas
- Bahrain
- Bangladesh
- Barbados
- Belarus
- Belgium
- Belize
- Benin
- Bolivia
- Bosnia & Herzegovina
- Botswana
- Brazil
- Brunei
- Bulgaria
- Burkina Faso

C

- Cambodia
- Cameroon
- Canada
- Cape Verde
- Chile
- China
- Colombia
- Congo
- Cook Island
- Costa Rica
- Croatia
- Cuba
- Cyprus
- Czech Republic

D

- Denmark
- Dominica
- Dominican Republic

E

- EASO
- East Timor
- Ecuador
- Egypt
- El Salvador
- Erritrea
- Estonia
- Ethiopia
- EU Commission
- EU Parliament

F

- Fiji
- Finland
- France

G

- Georgia
- Germany
- Ghana
- Greece
- Guatemala
- Guinea
- Guyana

H

- Holy See
- Honduras
- Hungary

I

- Iceland
- India
- Indonesia
- International Organisations
- Iran
- Iraq
- Ireland
- Israel
- Italy
- Ivory Coast

J

- Jamaica
- Japan
- Jordan

K

- Kazakhstan
- Kenya
- Korea (North)
- Korea (South)
- Kosovo

L

- Laos
- Latvia
- Lebanon
- Lesotho
- Liberia
- Libya
- Liechtenstein
- Lithuania

M

- Macedonia
- Malawi
- Malaysia
- Maldives
- Mali
- Marshall Islands
- Mauritania
- Mexico
- Moldova

- Monaco
- Mongolia
- Montenegro
- Morocco
- Mozambique

N

- New Zealand
- Nicaragua
- Niger
- Nigeria
- Norwayl

O

- Oman

P

- P.A.M.
- Pakistan
- Palestine
- Panama
- Paraguay
- Peru
- Philippines
- Poland
- Portugal

Q

- Qatar

R

- Romania
- Russia

S

- Saint Lucia
- Samoa
- San Marino
- Kingdom of Saudi Arabia
- Senegal
- Serbia
- Seychelles
- Sierra Leone
- Singapore
- Slovakia
- Slovenia
- Solomon Islands
- Somalia
- Sovereign Military Order of Malta
- Spain
- Sri Lanka
- Saint Vincent & The Grenadines
- St Kitts & Nevis
- Sudan
- Swaziland
- Sweden
- Switzerland
- Syria

T

- Tajikistan
- Thailand
- The Gambia
- Togo
- Tonga
- Trinidad & Tobago
- Tunisia
- Turkey
- Turkmenistan
- Tuvalu

U

- Uganda
- Ukraine
- UNHCR
- United Kingdom
- United States of America
- Uruguay
- Uzbekistan

V

- Vanuatu
- Venezuela
- Vietnam

Y

- Yemen

Z

- Zambia

FOREIGN CONSULAR REPRESENTATIONS IN MALTA

A

- Albania
- Austria
- Azerbaijan

B

- Bahamas
- Bangladesh
- Belarus
- Belgium
- Bosnia & Herzegovina
- Botswana
- Brazil
- Bulgaria

C

- Canada
- Chile
- Colombia
- Cyprus
- Czech Republic

D

- Denmark

E

- Ecuador
- Estonia

F

- Finland

H

- Honduras
- Hungary

I

- Iceland
- India
- Indonesia

J

- Japan
- Jordan

K

- Kazakhstan

L

- Latvia
- Lebanon
- Lithuania
- Luxembourg

M

- Malaysia
- Mali
- Mexico

- Monaco
- Montenegro
- Morocco
- Mozambique

N

- Namibia
- New Zealand
- Norway

P

- Pakistan
- Panama
- Peru
- The Philippines
- Poland

R

- Romania

S

- San Marino
- Serbia
- Seychelles
- Sierra Leone
- Slovakia
- Slovenia
- South Africa
- South Korea
- Sri Lanka
- Swaziland
- Sweden
- Switzerland

T

- Thailand
- The Gambia
- The Republic of Korea

U

- Uganda
- Ukraine
- Uruguay

V

- Vietnam

APPENDIX B: LIST OF INSTITUTIONAL CONTACTS

CENTRAL BANK OF MALTA

Address: Castille Place Valletta VLT 1060
Phone Number: +356 2550 0000
Fax Number: +356 2550 2500
Website: https://www.centralbankmalta.org/
Email: complaints@centralbankmalta.org

MALTA FINANCIAL SERVICES AUTHORITY

Address: Notabile Road, Attard BKR 3000
Phone Number: +356 2144 1155
Fax Number: +356 2144 1188
Website: https://www.mfsa.com.mt/

MINISTRY OF FOREIGN AFFAIRS AND TRADE PROMOTION

Address: Palazzo Parisio, Merchants Street, Valletta VLT 1171
Phone Number: +356 2124 2191
Fax Number:+356 2123 6604
Website: https://foreignaffairs.gov.mt/
Email: foreignaffairs@gov.mt

TRANSPORT MALTA (Corporate Services Directorate)

Address: Malta Transport Centre, Marsa MRS 1917
Phone Number: +356 2122 2203
Fax Number: +356 2125 0365
Website: www.transport.gov.mt
Email: info.tm@transport.gov.mt

MALTA ENTERPRISE CORPORATION

Address: Malta Industrial Parks Ltd., Gwardamangia Hill, Pietà
Phone Number: +356 2542 0000
Website: www.maltaenterprise.com/
Email: info@maltaenterprise.com

MALTA STOCK EXCHANGE

Address: Garrison Chapel, Castille Place, Valletta VLT 1063
Phone Number: +356 2124 4051
Fax Number: +356 2569 6316
Email: borza@borzamalta.com.mt
Website: www.borzamalta.com.mt

FINANCEMALTA: MALTA FINANCIAL SERVICES

Address: Garrison Chapel, Castille Place, Valletta VLT 1063
Phone Number: +356 2122 4525
Fax Number: +356 2144 9212
Website: http://www.financemalta.org
Email: contact@financemalta.org

MALTA TOURISM AUTHORITY

Address: Building SCM 01, Level 3, Smart City, Ricasoli, Kalkara SCM 1001
Phone Number: +356 2291 5000
Website: www.mta.com.mt, www.visitmalta.com
Email: info@visitmalta.com

MINISTRY FOR JUSTICE, CULTURE AND LOCAL GOVERNMENT

Address: 30, Old Treasury Street, Valletta VLT 1410
Phone Number: +356 2201 3000
Website: https://justice.gov.mt

DEPARTMENT OF INFORMATION

Address: 3, Castille Place, Valletta VLT 1062
Phone Number: +356 2200 1700
Website: www.doi.gov.mt
Email: info.doi@gov.mt

THE REGISTRY OF COMPANIES

Address: Malta Financial Services Authority, Notabile Road, Attard BKR 3000
Phone Number: +356 2144 1155
Fax Number: +356 2144 1195
Website: https://registry.mfsa.com.mt/ROC/
Email: info@rocmalta.com.mt

INDUSTRIAL PROPERTY REGISTRATIONS DIRECTORATE

Address: Commerce Department, Lascaris Bastion, Dahlet Gnien Is-Sultan, Valletta VLT 1933
Phone Number: +356 2122 6688
Website:

https://commerce.gov.mt/en/Industrial_Property/Pages/home.aspx
Email: commerce@gov.mt

MINISTRY FOR FINANCE

Address: 30, Maison Demandols, South Street, Valletta VLT 1102
Phone Number: +356 2599 8259
Fax Number: +356 2599 8429
Website: http://mfin.gov.mt/en/Pages/default.aspx
Email: info.mfin@gov.mt

MINISTRY FOR THE ECONOMY, INVESTMENT AND SMALL BUSINESS

Address: 197, Palazzo Zondadari, Merchants Street, Valletta VLT 2000
Phone Number:+356 22209500
Website:
https://economy.gov.mt/en/Pages/Home.aspx

MALTA ARBITRATION CENTRE

Address: Palazzo Laparelli 33, South Street, Valletta VLT 1100
Phone Number: +356 2122 2557, +356 2124 4497
Fax Number: +356 2123 0672
Website: www.mac.org.mt
Email: info@mac.com.mt

CENTRAL VISA UNIT – IDENTITY MALTA

Address: Identity Malta Agency
Mediterranean Conference Centre, Old Hospital Street, Valletta VLT 1645
Phone Number: +356 2590 4550
Website: https://identitymalta.com/visas/
Email: visa.ima@gov.mt

APPENDIX C: VISA REQUIREMENTS FOR FOREIGN NATIONALS

The Amsterdam Treaty, which came into force on 1st May 1999 harmonised the visa rules applying to travel for non-EU nationals. EU Member States with the exception of the United Kingdom and Ireland which, on the basis of a protocol annexed to the Treaty of Amsterdam, maintain autonomous visa, immigration and asylum policies are precluded from unilaterally determining the visa rules related to short-term stays for nationals of any third country.

Bound by Council Regulation (EC) No 539/2001, modified by Council Regulations (EC) No 2414/2001; Council Regulation (EC) No 453/2003; Act concerning conditions of accession; Council Regulation (EC) No 851/2005; Council Regulation (EC) No 1791/2006 (no longer in force); Council Regulation (EC) No 1932/2006; Council Regulation (EC) No 1244/2009; Regulation (EU) No 1091/2010 of the European Parliament and of the Council; and Regulation (EU) No 1211/2010 of the European Parliament and of the Council; Regulation (EU) No 517/2013 (no longer in force); Regulation (EU)No 610/2013 of the European Parliament and of the Council; Regulation EU) No 1289/2013 of the European Parliament and of the Council; Regulation (EU) No 259/2014 of the European Parliament and of the Council; Regulation (EU) No 509/2014 of the European Parliament and of the Council; the list of third-countries whose nationals are subject to the visa requirement, when travelling to Malta and/or any other EU Member State is as follows:

States

A

- Afghanistan
- Algeria
- Angola
- Armenia
- Azerbaijan

B

- Bahrain
- Bangladesh
- Belarus
- Belize
- Benin
- Bhutan
- Bolivia
- Botswana
- Burkina Faso
- Burma/Myanmar
- Burundi

C

- Cambodia
- Cameroon
- Cape Verde
- Central African Republic
- Chad
- China
- Colombia
- Congo
- Cote D'Ivoire
- Cuba

D

- Democratic Republic of Congo
- Djibouti
- Dominica
- Dominican Republic

E

- Ecuador
- Egypt
- Equatorial Guinea
- Ethiopia

F

- Fiji

G

- Gabon
- Gambia
- Georgia
- Ghana
- Guinea
- Guinea-Bissau
- Guyana

H

- Haiti

I

- India
- Indonesia
- Iran
- Iraq

J

- Jamaica
- Jordan

K

- Kazakhstan
- Kenya
- Kiribati
- Kuwait
- Kyrgyzstan

L

- Laos
- Lebanon
- Lesotho

- Liberia
- Libya

M

- Madagascar
- Malawi
- Maldives
- Mali
- Marshall Islands
- Mauritania
- Micronesia
- Morocco
- Mongolia
- Mozambique

N

- Namibia
- Nauru
- Nepal
- Niger
- Nigeria
- North Korea

O

- Oman

P

- Pakistan
- Palau
- Papua New Guinea
- Peru
- Philippines

Q

- Qatar

R

- Russia
- Rwanda

S

- Saint Lucia
- Saint Vincent & The Grenadines
- Samoa
- São Tomé & Príncipe
- Saudi Arabia
- Senegal
- Sierra Leone
- Solomon Islands
- Somalia
- South Africa
- Sudan
- Suriname
- Sri Lanka
- Swaziland
- Syria

T

- Tajikistan
- Tanzania
- Thailand
- The Comoros
- Timor-Leste
- Togo
- Tonga
- Trinidad & Tobago
- Tunisia
- Turkey
- Turkmenistan
- Tuvalu

U

- Uganda
- Ukraine
- United Arab Emirates
- Uzbekistan

V

- Vanuatu
- Vietnam

Y

- Yemen

Z

- Zambia
- Zimbabwe

Entities and Territorial Authorities that are not Recognised as States by at Least One Member State

- Palestinian Authority
- Kosovo (as defined by the United Nationals Security Council Resolution 1244 of 10th June 1999)

British Citizens Who are not Nationals of The United Kingdom of Great Britain and Northern Ireland for the Purpose of Community Law

- British Overseas Territories Citizens who do not have the right of abode in the United Kingdom
- British Overseas Citizens
- British Subjects who do not have the right of abode in the United Kingdom
- British Protected Persons

ADDITIONAL NOTES

A limited set of derogations and exceptions exist for specific categories of persons, notably on grounds of international law or custom. A Member State may provide for exceptions from the visa requirement provided for by Article 1(1) or from the exemption from the visa requirement provided for by Article 1(2) (of Council Regulation (EC) No 539/2001) as regards:

(i) holders of diplomatic passports, service/official passports or special passports;

(ii) civilian air and sea crew members in the performance of their duties;

(iii) civilian sea crew members, when they go ashore, who hold a seafarer's identity document issued in accordance with the International Labour Organisation Conventions No 108 of 13 May 1958 or No 185 of 16 June 2003 or the International Maritime Organisation Convention on Facilitation of International Maritime Traffic of 9 April 1965;

(iv) crew and members of emergency or rescue missions in the event of disaster or accident;

(v) civilian crew of ships navigating in international inland waters;

(vi) holders of travel documents issued by intergovernmental international organisations of which at least one Member State is member, or by other entities recognised by the Member State concerned as subjects of international law, to officials of those organisations or entities.

APPENDIX D: DOUBLE TAXATION TREATIES

Taxation Treaties in Force

- Andorra
- Albania
- Australia
- Austria
- Azerbaijan
- Bahrain
- Barbados
- Belgium
- Bulgaria
- Canada
- China
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Egypt
- Estonia
- Finland
- France
- Georgia
- Germany
- Greece
- Guernsey
- Hong Kong
- Hungary
- Iceland
- India
- Ireland
- Isle of Man
- Israel
- Italy
- Jersey
- Jordan
- Korea
- Kuwait
- Latvia
- Lebanon
- Libya
- Liechtenstein
- Lithuania
- Luxembourg
- Malaysia
- Mauritius
- Mexico
- Moldova
- Montenegro
- Morocco
- Netherlands
- Norway
- Pakistan
- Poland
- Portugal
- Qatar
- Romania
- Russia
- San Marino
- Saudi Arabia
- Serbia
- Singapore
- Slovakia
- Slovenia
- South Africa
- Spain
- Sweden
- Switzerland
- Syria
- Tunisia
- Turkey
- Ukraine
- United Arab Emirates
- United Kingdom
- United States of America
- Uruguay
- Vietnam

Treaties Signed But Not In Force

- Curaçao

Tax Information Exchange Agreements – In Force

- Bahamas
- Bermuda
- Cayman Islands
- Gibraltar
- United States of America

Tax Information Exchange Agreements – Signed But Not In Force

- Macao

GUIDE TO DOING BUSINESS IN MALTA